Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

v.

TARKINGTON, O'CONNOR & O'NEILL,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District, Division Five

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below erred in affirming the jury's liability determination on the ground that the First Amendment's requirement of independent appellate review in defamation cases is limited to the issue of actual malice and does not extend to the issue of "substantial truth" or falsity.

LIST OF PARTIES

All of the parties to the proceedings in the court below are included in the caption on the cover page of this petition.

RULE 29.6 STATEMENT

Petitioner's ultimate parent company is Allianz Aktiengesellschaft. Petitioner has no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fireman's Fund Insurance Company respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeal of California, First Appellate District, Division Five, in this case.

OPINIONS BELOW

The opinion of the court of appeal (App., *infra*, 1a-53a) is not reported. The order of the Supreme Court of California denying Fireman's Fund's petition for review (App., *infra*, 59a) and the order and judgment of the trial court (App., *infra*, 54a-58a) are not reported.

JURISDICTION

The judgment of the court of appeal was entered on June 17, 1998. Petitioner filed a timely petition for review in the Supreme Court of California, which was denied on September 30, 1998. App., *infra*, 59a. On December 23, 1998, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 28, 1999. *See* Application No. A-498. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

STATEMENT OF THE CASE

This case presents the important question whether the First Amendment requires independent appellate review of questions of "constitutional fact" in defamation cases, including the question whether an allegedly defamatory statement on a matter of public concern is "substantially

true" or false. That question arises with great frequency in defamation cases, and the lower courts are divided over its proper resolution. For the reasons set forth below, this Court's review is necessary to resolve that important and recurring question of First Amendment law.

A. Factual Background and Proceedings Below

1. In 1987, a consortium of insurers led by Commercial Union agreed to retain Tarkington, O'Connor & O'Neill (respondent herein) to represent their insured in numerous personal injury lawsuits. Fireman's Fund was a member of this consortium and therefore shared in the legal costs associated with the representation. As part of its representation of the insured, respondent was required to "spread bill" general work that related to multiple cases by allocating the time spent on such work to as many individual cases as was appropriate. App., *infra*, 2a.

In October 1989, Commercial Union informed respondent that a legal auditing firm had been retained to audit respondent's bills. That audit was completed in 1990, and "revealed numerous billing irregularities . . . ." App., *infra*, 3a. The insurers accordingly "sought a reduction in [respondent's] unpaid fees" and removed respondent as counsel for their insured. *Id.* Fireman's Fund and respondent ultimately submitted their dispute over the unpaid fees to binding arbitration in June 1991. *Id.* at 7a.

On August 1, 1991, *The Recorder*, a San Francisco legal newspaper, published an article discussing the audit of respondent's legal bills. The article reported the auditors' findings of numerous billing irregularities and improprieties, including "'vague descriptions of time, patterns of identical short entries billed to scores of files and a lack of back-up documentation for the billings.'" App., *infra*, 4a. The article also disclosed the auditors' findings that partners had "added time onto draft bills without preparing time sheets"; some $53,000 worth of time was billed by one of respondent's name partners who "did not do substantial work on the . . . litigation"; and another name part-

ner's time entries "did not correlate with the kind of work that he did" and "appeared to duplicate time sheets of a law clerk." *Id.* It is undisputed that the audit contained all of these findings. *Id.*

In addition, the article stated that when the time recorded by individual timekeepers was audited, "'some totals were mathematically impossible.'" App., *infra*, 4a. The article cited an instance in which, according to a representative of Fireman's Fund, one of respondent's name partners "'billed 33 hours one day.'" *Id.* The article noted respondent's claim that this was merely a "'data-inputting mistake[].'" *Id.* The article also referred to an instance "[w]here one timekeeper had billed 785 hours in a month—well above the 720 hours in a 30-day month." *Id.* The article identified no source for that allegedly defamatory statement, which constitutes the basis for this lawsuit.

In July 1992, the *Wall Street Journal* published an article about law firm overbilling that contained a brief discussion of respondent's billing irregularities. The article stated that "'[a] Fireman's Fund audit of [respondent] established that one senior partner at the San Francisco firm billed 33 hours in a single day, and another lawyer supposedly toiled 785 hours in a month (a 31-day month has only 744 hours) while working on an asbestos-related case.'" App., *infra*, 6a.

In March 1993, the arbitrator issued his decision in the overbilling dispute. App., *infra*, 61a-70a. He expressly found that "[respondent's] time keeping and task description . . . resulted in exaggerated unjustifiable time being billed," that "the use to which spread billing was put resulted in substantial over statement of the time expended in performing many tasks, and that little care was taken to curb such a tendency." App., *infra*, 67a. He further found that "over the years invoices were submitted for payment by the insurers with representations of time and task and case designations which were untrue." *Id.* at 68a. He determined that "[t]here can be no doubt that, as to the billing of the senior partner's time generated by merely adapting

another employee's time sheets, the practice was *wilfully and knowingly false*." *Id.* at 68a (emphasis added). And he found that other aspects of respondent's billing practices "amounted to a deceptive deviation from the terms of the agreement with the insurers" which "fell within the proscription of" California's statutory prohibition against constructive fraud. *Id.* at 69a.

The arbitrator declined to find that respondent's conduct "was 'an *extreme* case of fraud'" that would justify disallowance of *all* of respondent's fees. App., *infra*, 68a (emphasis added). He further held, however, that the absence of "extreme" fraud provided no bar to Fireman's Fund's right to "recovery of payments *induced by misrepresentation*." *Id.* (emphasis added). Accordingly, the arbitrator reduced respondent's fees by $463,579 "for overbilling and other improprieties." *Id.* at 7a, 70a. The arbitrator's decision was confirmed by a California state court (*id.* at 60a), thereby rendering the arbitrator's findings conclusive. Cal. Civ. Proc. Code § 1287.4.

2. In March 1994, respondent filed this action in California state court, alleging *inter alia* that Fireman's Fund had defamed it by causing publication of false statements to the effect that one of respondent's timekeepers had billed 785 hours in a month. Respondent also asserted a claim for breach of fiduciary duty. App., *infra*, 6a-7a.[1]

Respondent did not (and could not) dispute the arbitrator's findings that respondent had engaged in "overbilling and other improprieties." App., *infra*, 7a. Moreover, respondent "d[id] not dispute that 33 hours of billed time appeared on one timekeeper's statement for one day's activities." *Id.* at 4a. The parties disagreed over whether this

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[1] Respondent's complaint alleged a number of other claims, including breach of contract, fraud, and an additional defamation claim based on a speech by a Fireman's Fund executive, but those claims were rejected below. App., *infra*, 8a-10a, 26a.

admitted "instance of an impossible billing day" was "the result of a clerical error," but there is no question that "33.5 hours was billed on one day." *Id.* at 5a. Fireman's Fund stipulated that "the 785 hour billing month was not found in either an audit or a review of billings." *Id.* The only evidence of a 785-hour month came from statements made by a former partner of respondent whose "recollection of the number of hours billed in that month varied over time." *Id.*[2]

The jury found in favor of respondent on the defamation and fiduciary duty claims, and awarded $3 million in damages. The trial court granted Fireman's Fund's motion for judgment notwithstanding the verdict on the fiduciary duty claim, but rejected Fireman's Fund's post-trial challenges to the defamation verdict and upheld the jury's $3 million award. App., *infra*, 8a.

3. The court of appeal affirmed the judgment of liability on the defamation claim. App., *infra*, 14a-31a. By a 2-1 vote, the court rejected Fireman's Fund's argument that the First Amendment requires de novo appellate review of the falsity determination in cases involving speech on matters of public concern. *Id.* at 14a-17a. The court began its analysis by correctly recognizing that the allegedly defamatory statements concern a public issue, and thus the First Amendment is directly implicated in this case: "[A]ttorneys' billing practices are a public issue, because they determine the price paid by the public for attorneys' services. 'Members of the public "have an interest in matters which affect their roles as consumers."'" *Id.* at

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[2] Fireman's Fund disputed respondent's allegation that Fireman's Fund was responsible for the newspaper articles' references to a 785-hour-month, and there was no direct evidence to support that allegation. The jury nonetheless found in favor of respondent on that issue, and the court of appeal affirmed. App., *infra*, 26a-29a. Fireman's Fund does not seek this Court's review of that incorrect, but fact-bound, determination.

15a (citation omitted). The court also acknowledged that the First Amendment requires plaintiffs to "bear the burden of proving falsity of the defamatory statement, as well as proving fault." *Id.* at 15a.

Nonetheless, the court of appeal held that "[b]ecause there was no issue of actual malice in this private figure case, we are not required to conduct an independent review of the entire record." App., *infra*, 15a. The court reasoned that, pursuant to binding precedent of the Supreme Court of California, independent appellate review is required "'only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review.'" *Id.* (quoting *McCoy v. Hearst Corp.*, 727 P.2d 711, 716 (Cal. 1986)); *see also* App., *infra*, 15a ("the California Supreme Court has indicated its belief that a de novo standard of review applies only to the issue of actual malice"). The court of appeal therefore declined to apply independent appellate review to the question of substantial truth or falsity of the allegedly defamatory statements. *Id.* at 16a.

Applying only the deferential "substantial evidence" standard of review, the court of appeal rejected Fireman's Fund's challenge to the jury's finding that the 785-hour-month allegation was not "substantially true." App., *infra*, 17a-25a. The court recognized that under California law and the First Amendment, "'[m]inor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting of the libelous charge be justified."'" *Id.* at 18a (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)). Moreover, the court held that it is "reasonable" to construe the 785-hour-month statement as "imput[ing] only nonfraudulent overbilling of the type that the arbitrator determined [respondent] had committed." App., *infra*, 20a. Nonetheless, and despite the undisputed fact that respondent engaged in extensive overbilling and questionable billing practices, the court felt compelled to uphold the jury's finding of falsity because "we cannot overturn the jury's conclusion that the 785 hour billing

month statement went beyond an implication of overbilling and conveyed the false and defamatory imputation that [respondent] defrauded Fireman's Fund." *Id.* at 24a. The court explained that, in keeping with California law, it was "'not free to reweigh the evidence and set aside the jury verdict merely . . . because judges feel that other results are more reasonable.'" *Id.* (quoting *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 467 (9th Cir. 1978)).

The court of appeal rejected Fireman's Fund's other challenges to the defamation verdict, and accordingly affirmed the judgment of liability on that claim. App., *infra*, 26a-31a, 34a. The court also upheld the trial court's grant of judgment notwithstanding the verdict on the fiduciary duty claim. App., *infra*, 11a-14a. Because the jury's award of damages failed to differentiate between damages associated with the defamation claim and the overturned fiduciary duty claim, however, the court of appeal remanded the case for a new trial on the issue of damages only. *Id.* at 31a-32a, 34a. The court affirmed the judgment in all other respects. *Id.* at 34a.

Presiding Justice Peterson dissented from the majority's ruling on the defamation claim. App., *infra*, 35a-53a. He concluded that the First Amendment requires independent appellate review of the "substantial truth" issue, explaining that independent review "is not dependent on the presence of an actual malice issue, as the majority posits. To the contrary, that review is mandatory simply because constitutional free speech guarantees preclude defamation liability for utterances or publications comprising the substance, gist or sting of a truthful statement." *Id.* at 36a.

Applying the requisite independent review to the undisputed historical facts in the case, Justice Peterson concluded that the "gist" or "sting" of the 785-hour-month statement was "substantially true" and therefore nondefamatory. He explained that "'[t]he 'average reader' of the publication in question here would understand it as an accusation that [respondent] overbilled for its services. That accusation was shown by indisputable evidence to be

substantially true . . . ." *Id.* at 49a. "[W]here the gist or sting is overbilling, and where that accusation is true, an inaccuracy as to the time period overbilled for is not a substantial enough deviation from the truth so as to change the sting of the accusation . . . ." *Id.* at 49a.

Fireman's Fund filed a petition for review in the Supreme Court of California. Over the dissent of two justices, that court denied review. App., *infra*, 59a.

B. How The Federal Question Was Presented

Fireman's Fund expressly relied on the First Amendment and on this Court's precedents in the trial court. For example, Fireman's Fund cited *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), for the proposition that a defamation plaintiff "cannot meet [its] burden of proving falsity if the statement is substantially true, in that its gist or sting is accurate." C.T. 03980.[3] Likewise, Fireman's Fund cited *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), for the proposition that "[p]ursuant to the free speech protections provided by the United States . . . constitution[], a private figure plaintiff bears the burden of proving the falsity of an allegedly defamatory statement when the speech complained of involves a matter of public concern." C.T. 04049. And Fireman's Fund argued that respondent could not satisfy that constitutionally mandated burden because "the 'substance' or 'gist' of the '785 hour' statement is that the Firm overbilled," and "the Arbitrator's Decision confirms that [respondent] overbilled as a matter of law." C.T. 04088.

In the court of appeal, Fireman's Fund again relied on the First Amendment, and argued that the court was required to conduct an independent appellate review of the

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[3] "C.T." refers to the "clerk's transcript" of pleadings and other documents filed in the trial court and made part of the record on appeal. *See* CAL. R. CT. 4.5 and 5.

question of substantial truth or falsity. Pet. Ct. App. Br. at 14-16. In particular, Fireman's Fund argued that "[b]ecause this case involves First Amendment issues, 'an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrustion on the field of free expression."'" *Id.* at 15 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). Fireman's Fund specifically noted the trial court's denial of Fireman's Fund's motions seeking judgment based on "[respondent's] failure to prove that the 'gist' of the alleged defamation was false," and asserted that "[g]iven the First Amendment concerns at issue in this case, the trial court's denial of each of these motions should be subjected to this Court's independent review." *Id.* at 16. The court of appeal squarely addressed and rejected this argument. App., *infra*, 14a-17a.

Fireman's Fund also raised its First Amendment argument in the Supreme Court of California. Fireman's Fund asked that court to determine the "scope of review in a defamation case involving speech addressing a matter of public concern," and argued that "[g]iven the First Amendment rights at issue, this verdict should have been scrutinized on appeal to ensure that constitutional free speech protections were properly applied." Pet. for Rev. at 1 (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)); *see also, e.g.*, Pet. for Rev. at 21 ("[T]he [court of appeal] erred in holding that 'falsity' need not be independently reviewed. Only through independent review may an appellate court ensure that First Amendment principles are constitutionally applied.").

REASONS FOR GRANTING THE WRIT

As evidenced by the decision below, the California courts continue to shirk their constitutional obligation to conduct independent appellate review of issues of "constitutional fact" in defamation cases, and instead limit the scope of such review to the issue of "actual malice."

That unduly narrow reading of the First Amendment's requirement of independent review strikes at the heart of the protections crafted by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). For the reasons set forth below, the California courts' interpretation of the First Amendment is inconsistent with this Court's precedents, exacerbates a widening conflict among the lower state and federal courts, and unduly chills freedom of expression on matters of public concern. This Court's immediate review is therefore warranted.

I. The Decision Below Is Inconsistent With This Court's Precedents Mandating Independent Appellate Review In First Amendment Cases

The court of appeal squarely held that the First Amendment's requirement of independent appellate review applies only to the issue of "actual malice," and does not extend to the factfinder's resolution of the question of "substantial truth" or falsity. App., *infra*, 14a-17a. The court based that holding directly on the California Supreme Court's prior decision in *McCoy v. Hearst Corp.*, 727 P.2d 711 (Cal. 1986), which announced the rule that independent appellate review is required "only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review." *Id.* at 716; App., *infra*, 15a. *Accord McCoy v. Hearst Corp.*, 278 Cal. Rptr. 596, 601 (Cal. Ct. App. 1991) ("on the issue of actual malice, *as opposed to other factual issues in the case*, the courts are required to independently examine the record to determine whether it provides clear and convincing proof thereof") (emphasis added). Thus, it is clear that the California courts have adopted a rule limiting the First Amendment requirement of de novo appellate review to the question of "actual malice," while refusing to conduct such review of other factual questions in defamation cases—including the issue of "substantial truth" or falsity.

The fact that this rule has been announced in published opinions of the California appellate courts demonstrates that the unpublished nature of the opinion below does not militate against a grant of certiorari in this case. California's narrow reading of the First Amendment's independent-review requirement is now embedded in the law of that State, and thus is no longer deemed sufficiently noteworthy to justify issuance of a published opinion. Absent review by this Court in this case, therefore, the California courts' erroneous standard will continue to govern all defamation cases arising in the Nation's most populous State, even though, as demonstrated in this petition, that standard cannot be reconciled with this Court's precedents and conflicts with decisions from other States.

The rule adopted by the California courts and adhered to in the decision below is inconsistent with this Court's cases establishing the independent-review requirement. While this Court has not previously considered the precise question presented here, the applicable precedents compel the conclusion that the independent review requirement is not limited to the issue of "actual malice," but instead extends to all questions of "constitutional" fact—a category that plainly includes the question of "substantial truth" or falsity in cases like this one involving allegedly defamatory statements regarding matters of public concern.

A. The Requirement of Independent Review Applies to all Questions of "Constitutional Fact" in Defamation Cases

In *New York Times Co. v. Sullivan*, this Court adopted the "actual malice" standard for public-figure defamation cases, and made clear that independent appellate review of the record is required in defamation cases "to assure . . . [that] a forbidden intrusion on the field of free expression" has not occurred. 376 U.S. at 285. The Court's rationale for requiring independent appellate review in such cases was not in any way dependent on or limited to the issue of "actual malice." Instead, the Court expressed a consid-

erably broader rationale, describing the independent review requirement as one arising from the Court's duty "in proper cases . . . to make certain that [constitutional] principles have been constitutionally applied." *Id.* The case before it was "such a case," in the Court's view, "since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" *Id.* "*In cases where that line must be drawn*," the Court explained, "the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* (emphasis added). Thus, *New York Times* stands for the proposition that the requirement of independent review applies "[i]n cases where that line" between "speech unconditionally guaranteed and speech which may legitimately be regulated" must be drawn—a category that is not limited to the question of actual malice and that includes the full range of defamation cases implicating First Amendment concerns.

The Court reaffirmed the independent-review requirement in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). The *Bose* Court characterized that requirement as one that arises "*in cases raising First Amendment issues*," noting that in such cases "we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (emphasis added, citation omitted). Moreover, the *Bose* Court listed several narrow categories of speech that fall outside the scope of First Amendment protection (including "[l]ibelous speech"), and made clear that the obligation of independent review is triggered *whenever* the claim is made that particular speech falls into one of those unprotected categories. *Id.* at 504. The Court explained that "*[i]n each of these areas* . . . the unprotected character of particular communications[] ha[s] been determined by the *judicial evaluation of special facts* that have been

deemed to have constitutional significance." *Id.* at 504-05 (emphasis added). Thus, "[i]*n such cases*, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505 (emphasis added).

Accordingly, *Bose* reaffirms and underscores the unmistakable message of the *New York Times* decision: The rationale for the independent-review requirement is not dependent on or uniquely linked to the "actual malice" standard, but instead rests upon the fundamental obligation of courts to guard zealously the boundary between protected and unprotected speech by exercising exacting judicial scrutiny of those "special facts that have been deemed to have constitutional significance." 466 U.S. at 505. This heightened judicial scrutiny is essential to the survival of the free speech guarantee, because "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* In short, the First Amendment "imposes a special responsibility on judges *whenever* it is claimed that a particular communication is unprotected." *Id.* at 505 (emphasis added); *see also Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) ("This obligation [of independent review] rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and *we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.*") (emphasis added); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 & n.50 (1982).

The foregoing precedents make clear that the First Amendment requires independent appellate review *when-*

ever a plaintiff seeks to pierce the presumptively applicable protections of the First Amendment. In particular, these cases stand for the proposition that the independent-review requirement extends to all "facts that have been deemed to have constitutional significance" in First Amendment cases. *Bose*, 466 U.S. at 505. "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." *Id.* at 508 n.27.

Not every factual issue presented in a defamation case is subject to the independent review requirement, of course, because not every disputed fact is of "constitutional significance." Mere credibility determinations, for example, are not reviewed de novo (*see id.* at 511-14); "[t]here are . . . many findings of fact in a defamation case that are *irrelevant to the constitutional standard* . . . and to which the clearly-erroneous standard of Rule 52(a) is fully applicable." *Id.* at 515 n.31 (emphasis added). But with respect to those factual questions that are of constitutional significance, independent appellate review is required.

B. The Truth/Falsity Inquiry is of "Constitutional Significance" in Defamation Cases Involving Speech on Matters of Public Concern, and is Therefore Subject to Independent Review

The foregoing discussion compels the conclusion that the First Amendment requires independent appellate review of the determination whether an allegedly defamatory statement on a subject of public concern was "substantially true." Far from being "irrelevant to the constitutional standard" in such cases, the issue of substantial truth or falsity is an integral part of the "constitutional standard." Indeed, the rule that speech is constitutionally immune if its "gist" or "sting" is substantially true marks the line between "speech unconditionally guaranteed and speech which may legitimately be regulated" just as much as the requirement of proving actual malice.

This Court has repeatedly held that the question of falsity is one of constitutional dimension when the challenged

speech addresses a matter of public concern. In cases involving public-figure plaintiffs and speech on matters of public concern, the plaintiff "must show the falsity of the statements at issue in order to prevail in a suit for defamation." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *see, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) ("a statement . . . must be provable as false before there can be liability under state defamation law"); *Herbert v. Lando*, 441 U.S. 153, 176 (1979) ("the plaintiff must . . . prove a false publication attended by some degree of culpability"); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("a public official [is] allowed the civil remedy [of defamation damages] only if he establishes that the utterance was false").

The constitutional requirement of falsity is not satisfied if the challenged statement, while technically inaccurate, is "substantially true." In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), for example, the Court noted that First Amendment principles required placing "the burden . . . upon [the plaintiff] to prove falsity" in that case. *Id.* at 517. The Court then elaborated on the nature of the constitutionally compelled falsity inquiry, and held that the requisite showing of falsity could not be made if the allegedly defamatory statement was substantially true: "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* (citations omitted).

Although some of the foregoing cases involved public figure plaintiffs, and thus were governed by the *New York Times* "actual malice" standard, the Court has squarely held that the constitutional dimensions of the truth/falsity inquiry extend to cases involving private-figure plaintiffs who claim to have been defamed by speech on matters of public concern. In *Philadelphia Newspapers, Inc. v. Hepps*, the Court stated that "[w]hen the speech is of pub-

lic concern but the plaintiff is a private figure, . . . the Constitution still supplants the standards of the common law . . . ." 475 U.S. at 775. Thus, the Court held that "the common law's rule on falsity . . . must . . . fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776.[4] The Court recognized that shifting the common-law burden of proof would insulate some false statements from liability, but concluded that doing so was necessary to provide "breathing space" to constitutionally protected speech. *Id.* at 776-78.

As both courts below held, the allegedly defamatory speech at issue in this case—which concerns the important matter of substantial overbilling for legal services—plainly involves a matter of public interest and concern. App., *infra*, 15a. Accordingly, this Court's precedents conclusively establish that the question of "substantial truth" or falsity is one of "constitutional significance." And under *New York Times* and *Bose*, it is beyond dispute that the First Amendment's requirement of independent appellate review is directly applicable to such questions.

As noted above, the court of appeal rested its contrary conclusion on binding California case law limiting the in-

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[4] Although *Hepps* involved a media defendant (*see* 475 U.S. at 779 n.4; *Milkovich*, 497 U.S. at 20 n.6), courts routinely apply the same standard in cases involving non-media defendants. *See, e.g., Burroughs v. FFP Operating Partners, L.P.*, 28 F.3d 543, 549-50 (5th Cir. 1994); *In re IBP Confid. Bus. Docs. Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Nizam-Aldine v. City of Oakland*, 54 Cal. Rptr. 2d 781, 787 (Ct. App. 1996); *Ayala v. Washington*, 679 A.2d 1057, 1063 n.2 (D.C. 1996); *Wheeler v. Nebraska St. Bar Ass'n*, 508 N.W.2d 917, 921 (Neb. 1993); *Dodson v. Dicker*, 812 S.W.2d 97, 98-99 (Ark. 1991); *Caruso v. Local Union No. 690*, 730 P.2d 1299, 1302 (Wash. 1987). A small minority of jurisdictions have reached the opposite conclusion, however. *See, e.g., Kanaga v. Gannett Co.*, 687 A.2d 173, 181-82 (Del. 1996). This case provides an opportunity to resolve that conflict.

dependent-review requirement to the issue of actual malice. California's rule in that regard is patently incorrect, however, as the foregoing discussion amply demonstrates. Indeed, this Court has independently reviewed a wide array of "constitutional facts" in the First Amendment context, including issues other than actual malice in defamation cases. In *New York Times v. Sullivan*, for example, the Court applied independent review to the question whether the statements were "of and concerning" the plaintiff. 376 U.S. at 288 ("We also think the evidence was constitutionally defective in another respect [than the absence of actual malice]: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent."). Similarly, the *Bose* Court cited as another example of independent review the decision in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971), which "held 'as a matter of constitutional law' that the jury could not be allowed to determine the relevance of a defamatory statement to the plaintiff's status as a public figure." 466 U.S. at 509.

In *Milkovich v. Lorain Journal Co.*, moreover, the Court established that the requirement of de novo appellate review is fully applicable to the "constitutional facts" at issue in private-figure, public-concern cases. The *Milkovich* Court observed that where an allegedly defamatory statement "involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz* [*v. Robert Welch, Inc.*, 418 U.S. 323 (1974)]." 497 U.S. at 20-21. The Court then emphasized the necessity of independent appellate review in such cases: "[T]he enhanced appellate review required by *Bose Corp.* provides assurance that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion of the field of free expression.'" *Id.* at 21.

The import of this Court's precedents is thus unmistakable: The First Amendment requires de novo appellate review of "constitutional facts" in defamation cases, *in-*

cluding the question of "substantial truth" or falsity. The decision below, and the established rule in California, are squarely to the contrary. This Court's review is necessary to resolve the continuing conflict between California law and this Court's precedents. *See* SUP. CT. R. 10(c).

II. The Decision Below Exacerbates An Existing Conflict Among The Lower State And Federal Appellate Courts Regarding The Scope Of The Independent Appellate Review Requirement

California's prohibition of independent review in defamation cases except with respect to the issue of "actual malice" is inconsistent with the decisions of several other state appellate courts. In *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112 (Mich. 1991), for example, the Supreme Court of Michigan carefully reviewed First Amendment precedents and policy considerations and determined that "an independent appellate review of the burden of proof with regard to falsity in private-figure, public-interest cases deters 'forbidden intrusion on the field of free expression' as a logical corollary to independent review of actual malice." *Id.* at 124-25 (citation omitted). Accordingly, the *Locricchio* court held that "[t]he [First Amendment] principle of independent review logically extends to determining whether a plaintiff satisfies her burden of proving falsity." *Id.* at 125. The Michigan Supreme Court reaffirmed that conclusion in *Rouch v. Enquirer & News of Battle Creek Michigan*, 487 N.W.2d 205, 211-14 (Mich. 1992), expressly adhering to its view that, in accordance with the dictates of the First Amendment, "[w]e . . . independently review the whole record . . . to consider whether material falsity was shown." *Id.* at 214.

Similarly, in *Deaver v. Hinel*, 391 N.W.2d 128, 131-32 (Neb. 1986), the Supreme Court of Nebraska applied "heightened judicial scrutiny on appeal" and concluded that "[plaintiff] has not met the threshold burden of proving that the statements published in the Tribune were false." Although the plaintiff in *Deaver* was a public fig-

ure, the court found no need to reach the question of "actual malice," because its independent review of the record demonstrated that the plaintiff's "evidence fail[s] to establish with convincing clarity that the published statements were false." *Id.* at 132-33.

Likewise, in *Lyons v. Rhode Island Public Employees Council 94*, 559 A.2d 130 (R.I. 1989), the Supreme Court of Rhode Island applied independent review to the question of falsity. The court read *Bose* to impose a "duty of independently reviewing the entire record," and accordingly held that "[i]n order for us to uphold the verdict, the record must *independently* support the assertion that the alleged defamatory material contains a false and defamatory statement of fact." *Id.* at 135 (emphasis added). Based on its independent review, the court found that the allegedly defamatory statements were not actionable: "[W]e find that the jury is prevented from concluding that the article was false and defamatory. Therefore, we find that the [challenged] reprints did not contain a false and defamatory statement of fact." *Id.*[5] *See also Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1129 (7th Cir. 1987) (noting confusion over whether independent review applies to falsity issue, and "accepting, for purposes of this case only, . . . that *Bose* mandates a wide-ranging appellate review, with little or no deference to the jury's findings, of all aspects of this case including falsity"); *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 685 (5th Cir. 1984) (Tate, J., dissenting) (arguing that in a private-figure defamation case, *Bose* requires appellate courts to "independently determine, after affording weight

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[5] *Lyons* involved a public figure plaintiff, and the court separately addressed the question of actual malice. 559 A.2d at 136. The significance of *Lyons*, however, is that the court independently reviewed the issue of falsity, in direct contrast to the approach followed by the California courts.

to all credibility determinations by the trier of fact, whether the present expression . . . was false").[6]

Other appellate courts, by contrast, have adopted the same approach followed by the California courts, holding that the requirement of independent appellate review does not apply to the question of substantial truth or falsity. In *Lundell Mfg. Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1470 (1997), for example, the Eighth Circuit rejected independent review of falsity in private-figure defamation cases. In that case, the private-figure plaintiff argued that the court of appeals should review the jury's finding of falsity under the sufficiency-of-the-evidence standard, while the defendant contended that the First Amendment required independent appellate review. *Id.* at 356. Rejecting the defendant's argument, the Eighth Circuit held that "the First Amendment commands in a defamation case brought by a private plaintiff against a media defendant only that we review the record to determine whether a reasonable trier of fact could find that the statement could be interpreted as a false assertion of fact. In essence, [Supreme Court case

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[6] The Seventh Circuit's opinion in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993), is less than clear on this issue. Relying on *Bose*, the court stated that "[t]o any suggestion that the outer bounds of liability should be left to a jury to decide we reply that in cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on firm judicial control of the jury." *Id.* at 1234. In addressing the issue of substantial truth directly, however, the court stated that "[o]rdinarily the question whether a defamatory work is substantially true although erroneous in some details is for the jury. But no reasonable jury, even if it believed [the plaintiffs] on every issue . . ., could find that [defendant's book] was not substantially true in its depiction of [plaintiffs]." *Id.* at 1228. Thus, it is not entirely clear whether the court applied independent review, in keeping with *Bose*, or instead applied a more deferential standard.

law] support[s] a *sufficiency of the evidence* analysis." *Id.* at 359 (emphasis added).[7]

A number of other appellate decisions are to the same effect. *See, e.g., Levine*, 738 F.2d at 672 n.19 ("[W]e are convinced that the more rigorous standard of review mandated by *Bose* . . . for awards of actual damages in defamation suits brought by public-figure plaintiffs, is inappropriate here" in a private-figure-plaintiff case);[8] *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 464-65 (9th Cir. 1977) (rejecting de novo review of falsity determination, and opining that "it is questionable whether the issue of truth rises to the level of a 'constitutional fact'"); *Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 284 (S.C. 1996) ("We agree our scope of review on the issue of actual malice is a *de novo* review to determine if there is clear and convincing evidence. However, we do not agree

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[7] The *Lundell* court did state that "[w]ithin the context of deciding whether there is substantial evidence to support the jury's finding of falsity, we must also discern whether there has been any intrusion on the protections of the First Amendment. Thus, if no reasonable jury could conclude that the statement was a false statement of material fact, the libel defendant is protected from a defamation suit." 98 F.3d at 359. But the court concluded that "[t]he question of whether there has been any intrusion on First Amendment principles is seemingly subsumed in the inquiry as to whether there is substantial evidence to support the jury's findings as to falsity and substantial truth." *Id.* In other words, the only "independent review" required for falsity in private-figure defamation cases, according to the Eighth Circuit, is nothing more than the traditional clearly erroneous standard for routine factfinding under Fed. R. Civ. P. 52(a).

[8] The Fifth Circuit has subsequently reaffirmed *Levine*'s rejection of independent review. *See Brown v. Petrolite Corp.*, 965 F.2d 38, 43 (5th Cir. 1992) ("[T]he jury found that the statements . . . were false and defamatory. We must affirm this verdict if substantial evidence supports the jury's conclusion.") (citing *Levine*, 738 F.2d at 671).

this is the proper scope of review on the issue of falsity."), *cert. denied*, 117 S. Ct. 2455 (1997); *see also Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1081, 1084 (3d Cir. 1988) (reviewing falsity issue under deferential standard without expressly discussing obligation of independent review); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1073-74 (5th Cir. 1987) (same); *Gannett Co. v. Re*, 496 A.2d 553, 557-58 (Del. 1985) (same).

California's rejection of independent review for questions other than "actual malice" is also inconsistent with a number of decisions involving other "constitutional facts" in defamation cases. Thus, for example, a number of decisions have applied the *Bose* independent-review standard to the questions whether the allegedly defamatory statements had a defamatory meaning, were "of and concerning" the plaintiff, or (in cases involving private-figure plaintiffs) were made with the requisite negligence. *See Miami Herald Publ'g Co. v. Ane*, 458 So.2d 239, 242 (Fla. 1984) (applying independent review to issues of negligence and defamatory meaning); *Dodson v. Dicker*, 812 S.W.2d 97, 98-99 (Ark. 1991) (defamatory meaning); *Dixon v. Ogden Newspapers, Inc.*, 416 S.E.2d 237, 241 (W. Va. 1992) (same); *Deaver v. Hinel*, 391 N.W.2d at 133-34 (applying independent review in determining whether allegedly defamatory speech was "of and concerning" the plaintiff). Other jurisdictions, by contrast, follow California's approach and apply only deferential appellate review to these issues. *See, e.g., Brown v. Petrolite Corp.*, 965 F.2d 38, 45 (5th Cir. 1992) (applying deferential "substantial evidence" standard to jury's negligence finding); *Draghetti v. Chmielewski*, 626 N.E.2d 862, 868 n.10 (Mass. 1994) ("Because the 'actual malice' standard is inapplicable [in this private-figure-plaintiff case], so too is the *Bose* independent review doctrine."); *Michigan Microtech, Inc. v. Federated Publications, Inc.*, 466 N.W.2d 717, 722 (Mich. Ct. App. 1991) (reviewing negligence determination under deferential standard); *Lansdowne v. Beacon Journal Publ'g Co.*, 512 N.E.2d 979, 985 (Ohio 1987) ("in cases such as the one at bar, where actual malice need not

be proven, we decline to embrace the independent review requirement"); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 727-28 (Va. 1985) (rejecting independent appellate review of negligence and all other issues except "actual malice").

Commentators have noted the division and confusion among federal and state courts on the question whether *Bose*'s independent review standard applies to findings of falsity. *See, e.g.*, Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio St. L.J. 1753, 1808 n.70 (1998) ("[T]he language in *Bose* implied that independent review might be required any time a question of First Amendment protection was at stake. Since the requirement that plaintiffs prove negligence, *falsity*, defamatory meaning, and 'of and concerning' are all constitutionally mandated, it is arguable that these too require independent review. The lower courts are divided on these issues.") (emphasis added); Thomas B. Kelley & Steven D. Zansberg, *Why Courts Should Require Plaintiffs Claiming Losses to Prove that Falsity Caused Harm*, 15 Comm. Law. 8, n.33 (Fall 1997) ("The circuits differ over whether the issue of falsity should be subject to independent review by the court, and the Supreme Court has left the question unresolved.") (citation omitted); Libel Defense Research Center, *Ten Years of Appellate Review In Defamation Cases from* Bose *to* Connaughton *to the Present*, LDRC Bulletin, 1994 Issue No. 2, at 17 (Apr. 1994) [hereinafter *Ten Years of Appellate Review*] ("30% of courts that considered the issue applied independent appellate review to the issue of falsity. . . . Most courts, however, continue to apply a clearly erroneous standard to the falsity issue, although few such courts have explicitly rejected the extension of independent appellate review to this issue. . . ."); *see also* David A. Anderson, *Is Libel Law Worth Reforming*, 140 Pa. L. Rev. 487, 497 (1991) ("Whether other issues may also be subject to independent review is open to question. The rationale [of *Bose*] . . . seems equally applicable to any other constitutional prerequisite. . . . The scope of independent review remains unclear . . . .").

III. The Question Presented Is An Important And Recurring One, And Immediate Review Is Essential In Order To Avoid The Substantial Chilling Of Protected Speech That Results From The Rule Of Law Applied Below

As the discussion above demonstrates, the question whether the truth/falsity determination is subject to independent review arises with considerable frequency in defamation cases. Numerous courts have decided that question in different ways, and other courts have implicitly rejected independent review by continuing to apply a deferential standard. *See Ten Years of Appellate Review*, *supra*, at 17 (noting that 30% of courts addressing the question have adopted independent review but that most courts "continue to apply a clearly erroneous standard").

This question, moreover, is clearly one of substantial importance. Indeed, one study of the conflicting case law in this area suggests that the standard of review is outcome-determinative in the vast majority of such cases. *Id.* at 1 ("In cases that independently reviewed the issue of falsity, appellate courts reversed the trial court judgment on that issue in 83.3% of the cases studied, compared with a reversal rate of only 8.3% in cases in which falsity was reviewed on a 'clearly erroneous' standard.").

This Court has frequently granted certiorari in order to clarify the standards of review to be applied by appellate courts. *See*, *e.g.*, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Koon v. United States*, 518 U.S. 81 (1996); *Salve Regina College v. Russell*, 499 U.S. 225 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). As this Court recognized in *Salve Regina*, "the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.' When *de novo* review is compelled, no form of appellate deference is acceptable." 499 U.S. at 238 (citation omitted); *see also Bose*, 466 U.S. at 501 ("The difference between the two

[standards of review] . . . is much more than a mere matter of degree."); *see also United States v. Conley*, 4 F.3d 1200, 1204 (3d Cir. 1993) ("[T]he standard of review can be outcome determinative."); *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992) ("The relevant standards of review are critical to the outcome of this case.").

Immediate review of this important and recurring question is particularly appropriate here, because the alternative is to leave in place an existing rule of law that has, and will continue to have, a significant chilling effect on protected First Amendment speech. By abdicating its constitutional responsibility to "make an independent review of the whole record" in order to ensure "that the judgment below does not constitute a forbidden intrusion on the field of free expression," the court below left to the vagaries of jury verdicts the important task of determining "'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" *New York Times*, 376 U.S. at 285. Because this line marks the boundary between immunity from liability and the potential for multimillion-dollar verdicts—as this case so aptly demonstrates—the rule applied below necessarily leads to a substantial chilling of free expression. By subjecting speakers to such a legal lottery, California's rule poses a clear threat to speech on matters of public concern—the very concern that motivated the independent-review standard in the first place. *See id.* at 278 ("[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.").

Indeed, the chill on protected speech caused by the decision below is three-fold. First, absent independent judicial review, there is a substantial risk that juries will erroneously impose liability on protected speech. For precisely that reason, this Court in *Bose* held that appellate courts are obligated to undertake independent review of constitutional facts "both to be sure that the speech in question actually falls within the unprotected category and

to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." 466 U.S. at 505; *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized.").

Similarly, in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971), the Court held that "as a matter of constitutional law" a jury could not be allowed to determine the relevance of a defamatory statement to the plaintiff's status as a public figure. A jury's resolution of that issue, the Court warned, "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Id.* (citation omitted). The Court's warning is equally applicable to the question of substantial truth, and the risk of such erroneous judgments has a clear potential to chill substantially true (and thus protected) speech. Speakers will have no choice but to reexamine and modify their speech on matters of public concern in order to avoid the risk of substantial and unjustified damage awards if this Court does not act expeditiously to reject the legal standard adhered to below. *See New York Times,* 376 U.S. at 277 ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

Second, the sheer cost and uncertainty of protracted litigation, which California's rule encourages, threatens to chill substantially true speech. This Court has repeatedly observed that fear of the burdens and risks of litigation will inevitably spur self-censorship in the absence of vigorous judicial enforcement of First Amendment principles. *See Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The

chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 794 (1988); *see also Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732 (1980). By eliminating independent judicial review, and thereby leaving to random juries the important task of defining the boundaries of the First Amendment's protections, the decision below encourages excessive litigation and thereby chills speech.

Third, the fact that California's rule contributes to the conflict and confusion among federal and state courts on this issue also chills protected speech. "[I]t would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989) (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974)). "[A]n uneasy and unsettled constitutional posture" for the scope of the independent-review requirement "could only further harm the operation of a free press." *Id.*

For all these reasons, this Court should grant review immediately in this case, without permitting the further harm to First Amendment interests that will necessarily ensue if California's prohibition against independent review is permitted to stand. Moreover, given the court of appeal's remand of this case for a new trial on damages, immediate review is essential to "avoid[] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski*, 380 U.S. at 487. The Court should act now to prevent the "chilling effect upon the exercise of First Amendment rights" that will inevitably result "from the fact of the [ongoing] prosecution" of respondent's claims. *Id.*

IV. The Judgment Below Is Final For Purposes Of This Court's Review Under 28 U.S.C. § 1257(a)

The decision below finally resolves the important ques-

tion of First Amendment law presented in this petition. Accordingly, the judgment is sufficiently final to permit immediate review by this Court under 28 U.S.C. § 1257(a).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four categories of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be had in the state courts. The fourth such category involves "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-83. In these circumstances, "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483.

The fourth *Cox Broadcasting* category is plainly applicable here. The First Amendment question presented in the petition has been finally decided by the court below, which squarely rejected Fireman's Fund's request for de novo appellate review of the "substantial truth" issue. App., *infra*, 14a-17a. Moreover, the judgment below upholds the liability determination on the defamation claim. *Id.* at 34a. Accordingly, all aspects of the First Amendment issue have been resolved, and there is no need for further proceedings to finalize or crystallize the lower court's disposition of the federal question.

It is equally clear that, absent immediate review, Fireman's Fund "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." 420 U.S. at 482. The case was re-

manded solely for a retrial on damages, and it is entirely conceivable that the results of that limited retrial could eliminate Fireman's Fund's incentive to litigate further, thereby depriving this Court of an opportunity to decide the important First Amendment issue at stake.[9]

In addition, reversal of the court below on the First Amendment issue "would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 482-83. As the dissenting justice below convincingly demonstrated—without contradiction from the majority—application of de novo appellate review inexorably leads to the conclusion that the jury's finding of falsity must be reversed. Given the undisputed facts that respondent engaged in "overbilling and other improprieties" (App., *infra*, 7, including "exaggerated unjustifiable time" entries and "substantial overstatement of . . . time," "representations of time and task . . . which were untrue," "wilfully and knowingly false" entries, "a deceptive deviation" from its contractual obligations, the receipt of "payments induced by misrepresentation," and the billing of 33 hours in a single day (*id.* at 4a, 68a-70a), the allegedly inaccurate reference to an impossible billing month was substantially true, because its "gist" or "sting"—that respondent committed gross billing improprieties and misrepresentations—was wholly accurate.

Finally, it is readily apparent that "a refusal immediately to review the state-court decision might seriously

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[9] Indeed, given the devastating nature of the concededly non-defamatory statements made in the press regarding respondent's overbilling—such as the statements that approximately $53,000 worth of time was billed by one of respondent's name partners who "did not do substantial work on the . . . litigation" and that "one senior partner at the San Francisco firm billed 33 hours in a single day," App., *infra*, 4a-6a—the jury could conclude that the 785-hour-month allegation was not itself responsible for any compensable damages.

erode federal policy." 420 U.S. at 483. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application" of the fourth *Cox Broadcasting* category. *Fort Wayne Books*, 489 U.S. at 55. As demonstrated above, the California courts' refusal to conduct independent appellate review of issues other than "actual malice" plainly raises substantial First Amendment questions and chills constitutionally protected speech. Absent immediate review, Fireman's Fund may prevail on nonconstitutional grounds, but the pernicious effects of California's erroneous rule will remain intact. Accordingly, the judgment below is "final" for purposes of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted. In view of the clear inconsistency between the decision below and this Court's precedents, the Court may wish to consider summary reversal.

Respectfully submitted.

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January 28, 1999

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
SEE CONCURRING AND DISSENTING OPINION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

TARKINGTON, O'CONNOR & O'NEILL, **Plaintiff and Appellant,** **v.** **FIREMAN'S FUND INSURANCE COMPANY,** **Defendant and Appellant.**	**A077091** **(San Francisco County Super. Ct. No. 958950)**

[FILED June 17, 1998]

Plaintiff Tarkington, O'Connor & O'Neill (Tarkington) and defendant Fireman's Fund Insurance Company (Fireman's Fund) both appeal a judgment after jury trial awarding Tarkington $3,000,000 for defamation. Fireman's Fund appeals the denial of summary judgment on the defamation cause of action, the jury's finding of defamation, and the trial court's denial of its motion for a new trial on defamation and damages. Tarkington appeals the summary judgment order dismissing one of its defamation claims, the directed verdict dismissing its claim for breach of a contract of confidentiality, the judgment notwithstanding the verdict dismissing its claim for breach of fiduciary duty, and the postjudgment order offsetting the damages by $510,000 received by Tarkington in the settlement of

related litigation. We reverse the award of damages, affirm the remainder of the judgment and remand for a new trial on the amount of damages caused by the defamation only.

BACKGROUND

In May 1987, Tarkington was asked by the insurers of Plant Insulation (Plant) to represent the company in several thousand asbestos-related personal injury suits. Plant was insured by a consortium of insurers led by Commercial Union that included Fireman's Fund.

In the course of representing Plant, Tarkington would frequently do work that generally benefited many of the thousands of Plant cases. The consortium required Tarkington to spread bill such general work across as many appropriate individual cases as possible. Spread billing required the firm to enter thousands of time entries and prepare thousands of small-increment bills on a monthly basis. Tarkington conceded that spread billing led to some overbilling, but also provided evidence of many instances of underbilling caused by the complexity of the spread billing system.

In an October 4, 1989 meeting not attended by Fireman's Fund, Commercial Union informed Tarkington that it had hired the legal auditing firm Stuart, Maue, Mitchell & James to review the firm's bills in the Plant litigation. Stuart, Maue, Mitchell & James had been used extensively by Fireman's Fund in the past, including assignments as an auditor of Tarkington on other matters. Mr. O'Neill acknowledged at trial that Tarkington had to submit to the audit if it wanted its bills paid.

Tarkington asked Commercial Union that the audit be confidential. Mr. Tarkington and Mr. O'Neill testified that Commercial Union had agreed at the meeting to keep the audit confidential, but did not recall any discussion of the fiduciary duties of the parties. Before releasing billing records to the auditors, Tarkington sent a letter stating its understanding that the audit would be confidential, and

that Commercial Union was acting as Tarkington's fiduciary in protecting the confidentiality of any material reviewed during the audit. However, no written confidentiality agreement was signed by Commercial Union or any other member of the Plant consortium.

On June 4, 1990, Tarkington met with representatives of all of the insurers in the Plant consortium at the offices of Commercial Union's attorneys in Los Angeles to respond to the results of the audit. The audit had revealed numerous billing irregularities, related in large part to administrative difficulties inherent in managing the spread billing system. The insurers sought a reduction in Tarkington's unpaid fees. In August 1990, the consortium replaced Tarkington as counsel for Plant.

Shortly after the June 4 meeting, the July 1990 *American Lawyer* reported that Tarkington was being audited in connection with its representation of Plant. James Schratz of Fireman's Fund, who had attended the June 4, 1990 meeting, was quoted in the article as being "most disturbed" by the audit. Mr. O'Connor was also contacted by the author of the article before it was published, and immediately protested to the consortium that the confidentiality of the audit had been violated.

Within a month of *The American Lawyer* article, Mr. Schratz contacted former Tarkington partner Steven Pahl to gather more information about Tarkington's billing practices. Mr. Pahl was in the midst of a dispute with Tarkington over the value of his partnership shares, which he continued to hold after leaving the firm. He had been a member of Tarkington's executive committee and participated in the firm's financial management. However, he never worked on the Plant litigation, and never read the audit report. Over the course of the next year, Mr. Schratz had a series of conversations and correspondence with Mr. Pahl, eventually giving Mr. Pahl a release from any liability for Tarkington's overbilling in exchange for confirmation of details of Tarkington billing improprieties. Mr. Schratz's attention focused on confirming Mr. Pahl's alle-

gation that Mr. O'Connor had billed more hours in a single month than there actually are in a month.

On August 1, 1991, *The Recorder*, a San Francisco legal newspaper, published a front-page article that described the details of the Plant audit. It reported that: the auditors found "vague descriptions of time, patterns of identical short entries billed to scores of files and a lack of back-up documentation for the billings"; Tarkington partners added time onto draft bills without preparing time sheets; the auditors failed to verify $53,000 of time billed by Mr. O'Connor, although he did not do substantial work on the Plant litigation; Mr. Tarkington's time entries were vague and did not correlate with the kind of work that he did; Mr. Tarkington's time sheets appeared to duplicate time sheets of a law clerk; and a lawyer billed 20 hours on the day after the October 1989 Loma Prieta earthquake. Tarkington does not dispute that the audit contained those findings.

However, *The Recorder* article also contained a statement that Tarkington alleges is false and defamatory. The passage at issue read: "When Tarkington, O'Connor's massive quarterly bills were analyzed to show the work recorded by individual timekeepers, some totals were mathematically impossible. [¶] Tarkington billed 33 hours one day, for instance, according to Schratz of Fireman's Fund. [¶] Brockett [an attorney representing the Tarkington firm] says these anomalies turned out to be data-inputting mistakes. Three days of Tarkington's time had been recorded on one date, he says. Where one timekeeper had billed 785 hours in a month -- well above the 720 hours in a 30-day month -- Brockett says three months worth of time had been combined accidentally in one month, with no time entries in adjacent months."

The alleged defamation is the statement that a timekeeper billed 785 hours in one month. Tarkington does not dispute that 33 hours of billed time appeared on one timekeeper's statement for one day's activities. Mr. O'Connor testified that it did occur and was in the audit. However,

Tarkington presented evidence that this instance of an impossible billing day was the result of a clerical error in which an entire week of one attorney's time was billed on a single day. The evidence showed that 33.5 hours was billed on one day, and there was no other billing by that attorney to the Plant cases during the same week. Fireman's Fund disputes the explanation of that one day's billing, but did not present any evidence of an attorney billing more than 24 hours in one day other than that single occasion.[1]

On the other hand, there was no evidence of a 785 hour billing month. This would have required an attorney to bill an average of more than 25 hours per day for 31 consecutive days. There was no such evidence in the asbestos audit. Tarkington's accounting records do not otherwise show a 785 hour billing month. The jury instructions included a stipulation by Fireman's Fund that the 785 hour billing month was not found in either an audit or a review of billings. The only evidence of an impossible billing month came through statements made by former Tarkington partner Mr. Pahl, who never worked on asbestos cases, left the firm before the Plant audit, and was involved in the dispute over his partnership shares at the time he first alleged the existence of an impossible billing month. His own recollection of the number of hours billed in that month varied over time. At one point he denied its existence, only to later confirm it in writing in return for a formal release from overbilling liability offered by Fire-

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[1] The decision of the arbitrator who later decided the billing dispute between Fireman's Fund and Tarkington refers to a single instance of impossible daily billing as a day of "29 hours reduced from a time sheet of 32.3 hours created by allocating .1 hour to 323 files." Tarkington explained this as an error made by a paralegal unfamiliar with the spread billing system who worked on asbestos cases for only one day.

man's Fund. Other than Mr. Pahl's statements, Fireman's Fund presented no evidence that any timekeeper's monthly billing ever approached 785 hours.

A second alleged defamation occurred in an April 1992 speech that Mr. Schratz gave to the Sonoma County Bar Association. Mr. Schratz told the audience that "[f]inding 24 hour days, billing days are very common. Somebody, 33 hours, 45 hours, 59 hours billing. Once you get over the artificial constraint of a 24 hour day, there's no limitation ... we have to expand our horizons here. One of the ways they're doing that is on mass tort cases billing 1/10 or 2/10 of and [sic] hour for 4000 files. And there is no way the carrier could catch it because 4000 bills would come in and there'd be a bill, one page bill for each file and there's 4000 files. The adjuster will literally every month get Bekins boxes full of bills and unless we laid out or we did a compute scan, laid out every single bill to see on Feb. 25 1990 that they billed 2/10, one attorney billed 2/10 of an hour for 4000 files there is no way that we're going to catch it."

The final alleged defamation took place in a July 21, 1992 *Wall Street Journal* article describing overbilling by law firms that repeated the allegation that a Tarkington partner had billed 785 hours in one month. The only reference to Tarkington was made in the following paragraphs: "Mr. Schratz says he has found that many lawyers claim questionable hours. A Fireman's Fund audit of Tarkington, O'Connor & O'Neill established that one senior partner at the San Francisco firm billed 33 hours in a single day, and another lawyer supposedly toiled 785 hours in a month (a 31-day month has only 744 hours) while working on an asbestos-related case. [¶] Such industriousness prompted Mr. Schratz to stop payment on some $800,000 in fees to the firm, which has represented U.S. taxpayers in cases of failed savings and loans. The case was apparently recently settled; neither side will discuss it now. A lawyer for the firm said in a report published last summer by *The Recorder*, a San Francisco legal newspaper, that Mr.

Schratz refused to accept the explanation that the discrepancies were clerical errors or innocent mistakes." Tarkington demanded a retraction of the 785 hour billing month statement, and received one on July 25.

Tarkington's fortunes declined dramatically in the years after the audit findings and the 785 hour billing month statement were publicized in *The Recorder* on August 1, 1991. The firm shrunk from 80 attorneys in mid-1991 to 8 lawyers at the time of trial in 1996. Its billed fees dropped from $18 million in the fiscal year of June 30, 1990, to June 30, 1991, down to $4.8 million in the fiscal year of June 30, 1994, to June 30, 1995.

Tarkington negotiated a resolution of the audit with all of the consortium's insurers except Fireman's Fund. Fireman's Fund and Tarkington agreed to submit their billing dispute to binding arbitration. On March 9, 1993, the arbitrator reduced Tarkington's $870,241 bill by $463,579 for overbilling and other improprieties.

On March 1, 1994, Tarkington filed this lawsuit. After a series of pretrial rulings on motions to strike and demurrers, Tarkington filed its fifth amended complaint on September 15, 1995. Among other claims, the complaint contained a cause of action for breach of a contract to keep the audit confidential, for breach of fiduciary duty by the release of confidential information, defamation, and fraud.

The trial court dismissed Tarkington's defamation claim based on Mr. Schratz's speech to the Sonoma County Bar Association on Fireman's Fund's motion for summary adjudication. The order held that Mr. Schratz's statement was substantially true.

At the close of plaintiff's evidence at trial, the trial court granted Fireman's Fund's directed verdict motion on the cause of action for breach of the contract of confidentiality on the grounds of noncompliance with the statute of frauds and the absence of essential terms.

Three claims were presented to the jury: breach of fiduciary duty, defamation by publication of the 785 hour billing month statement, and fraud. Fireman's Fund proposed a special verdict form that would have allocated damages among Tarkington's claims, but it was rejected by the trial court. The jury found Fireman's Fund liable for both breach of fiduciary duty and defamation, but not liable for fraud. It awarded a sum of $3 million with no allocation between breach of fiduciary duty and defamation.

The trial court granted Fireman's Fund's judgment notwithstanding the verdict on the breach of fiduciary duty claim, but denied its motion for a new trial seeking reversal of the defamation finding and the damages award. The trial court also granted a full $605,000 offset for Tarkington's pretrial settlements of $95,000 with Mr. Schratz and $510,000 with Mr. Pahl.

DISCUSSION

I. Directed Verdict on the Confidentiality Agreement

Tarkington appeals the trial court's grant of Fireman's Fund's motion for a directed verdict on the cause of action for breach of contract. "'On appeal from a judgment on a directed verdict, appellate courts view the evidence in the light *most favorable to appellant*. All conflicts must be resolved and inferences drawn in appellant's favor; and the judgment will be reversed if there was substantial evidence . . . tending to prove all elements of appellant's case.' [Citation.]" (*Rotman v. Maclin Markets, Inc.* (1994) 24 Cal. App. 4th 1709, 1712-1713, italics in original.) We conclude the issue of compliance with the statute of frauds is dispositive. Since there is no evidentiary conflict on this issue, Tarkington's alleged oral confidentiality agreement is unenforceable as a matter of law.

Tarkington does not dispute that the alleged oral confidentiality contract was subject to the statute of frauds. Civil Code section 1624, subdivision (a) makes unenforceable "[a]n agreement that by its terms is not to be per-

formed within a year from the making thereof" unless "[it], or some note or memorandum thereof [is] in writing and subscribed by the party to be charged or by the party's agent." Tarkington does not claim that the confidentiality contract could be performed within a year, and does not suggest that there is any writing signed by Fireman's Fund memorializing the alleged contract. Mr. Tarkington and Mr. O'Neill both admitted at trial that no written contract of confidentiality was drawn up after the October 4, 1990 meeting announcing the audit.

Instead, Tarkington contends that the confidentiality contract falls under the exception to the statute of frauds created when the party seeking to avoid the oral contract is estopped from contesting it. "[E]stoppel is proper to avoid unconscionable injury or unjust enrichment that would result from refusal to enforce an oral promise." (*Phillippe v. Shapell Industries* (1987) 43 Cal. 3d 1247, 1259 (*Phillippe*), citing *Monarco v. Lo Greco* (1950) 35 Cal. 2d 621.) Tarkington argues that it has suffered unconscionable injury because Fireman's Fund's oral promise induced it to substantially change its position by releasing sensitive confidential information to the insurer.

We conclude that Tarkington's injury was not unconscionable as a matter of law, because Tarkington's reliance on Fireman's Fund's oral promises of confidentiality was inherently unreasonable. "To give rise to equitable estoppel, the promisee's reliance must be reasonable." (*Phillippe, supra*, 43 Cal. 3d at p. 1262.) As a law firm, Tarkington is presumed to know the circumstances under which an oral promise is unenforceable under the statute of frauds. Our conclusion is guided by *Phillippe*, in which the Supreme Court held that "a licensed real estate broker or salesperson cannot assert equitable estoppel against a statute of frauds defense to an oral commission agreement that is subject to Civil Code section 1624(d) unless there is a showing of actual fraud by the party to be charged under the invalid oral agreement." (*Phillippe, supra*, at p. 1264.) The Supreme Court concluded that a "broker's reliance on

the oral contract was not reasonable in light of the broker's presumed knowledge of the requirements of the statute of frauds." (*Id.* at p. 1262.)

The rationale of *Phillippe* applies as strongly to attorneys as it does to real estate brokers. *Phillippe* examined the education and licensing requirements for real estate brokers and required a presumption that real estate brokers know that oral brokerage agreements will not be enforced. (*Phillippe, supra*, 43 Cal. 3d at pp. 1261-1262.) Attorneys should be held to the same presumption when they enter into oral contracts that cannot be performed within one year. Fundamental legal education and licensing standards require that attorneys be knowledgeable in the law of contracts, including the statute of frauds. In representing a client, attorneys are "expected . . . to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." (*Smith v. Lewis* (1975) 13 Cal. 3d 349, 358, citations omitted.) The statute of frauds is a plain and elementary principle of law, and the unenforceability of a perpetual oral agreement could have been discovered in a cursory review of standard research texts. (See, e.g., 1 Witkin, Summary of Cal. Law (9th ed. 1990) Contracts, §§ 282-289, pp. 274-279.) Therefore, it is unreasonable for Tarkington to have relied on oral promises of perpetual confidentiality.

Tarkington also argues that the estoppel exception to the statute of frauds should be applied here to avoid the perpetuation of a fraud. (See *Phillippe*, *supra*, 43 Cal. 3d at pp. 1264, 1269-1270.) However, the jury in this case found that Fireman's Fund did not commit actual fraud. Therefore, the alleged oral confidentiality agreement is unenforceable under the statute of frauds.

II. Judgment Notwithstanding the Verdict on the Breach of Fiduciary Duty

Tarkington contends that it presented sufficient evidence to support the jury's finding that Fireman's Fund was liable for breaching a fiduciary duty it owed to Tarkington. On appeal from a judgment notwithstanding the verdict, we view the evidence in the light most favorable to appellant and will reverse if substantial evidence supported the jury verdict. (*Hasson v. Ford Motor Co.* (1977) 19 Cal. 3d 530, 546.) Reviewing the evidence in that light, we conclude that Tarkington did not prove that Fireman's Fund owed it a fiduciary duty.

Tarkington has not satisfied either of the two tests for showing that Fireman's Fund owed a fiduciary duty. "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 221, citations omitted.)

The relationship between Tarkington and Fireman's Fund did not impose on Fireman's Fund a fiduciary obligation. Tarkington cites no cases where the relationship between an attorney and the insurer of the attorney's client imposes fiduciary obligations on the insurer towards the attorney. Relying on *Tri-Growth Centre City, Ltd. v. Silldorf Burdman, Duignan & Eisenberg* (1989) 216 Cal. App. 3d 1139 (*Tri-Growth*), Tarkington suggests that the communication of confidential material, standing alone, created a fiduciary duty. *Tri-Growth* does not support that contention. In that case, the defendant was a law firm that had provided legal services to partnerships formed by individual plaintiffs. A member of the firm was plaintiffs' limited partner. (*Id.* at pp. 1145-1146.) The receipt of confidential client information from plaintiffs subjected the law firm to the traditional fiduciary obligations of both an attorney towards a client and a partner towards another

partner. (*Id.* at pp. 1150-1151.) Here, Fireman's Fund's receipt of confidential information from Tarkington did not implicate any legally recognized fiduciary duty owing from Fireman's Fund to Tarkington.

"The mere fact that in the course of their business relationships the parties reposed trust and confidence in each other does not impose any corresponding fiduciary duty in the absence of an act creating or establishing a fiduciary relationship known to law." (*Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc.* (1983) 142 Cal. App. 3d 589, 595.) Tarkington argues that a fiduciary and confidential relationship can exist between parties even though some aspects of the relationship are arms-length. However, this would require Fireman's Fund to have knowingly undertaken to act as Tarkington's fiduciary.

Tarkington did not present substantial evidence that Fireman's Fund "knowingly undert[ook] to act on behalf and for the benefit of" Tarkington. (*Committee on Children's Television, Inc., supra*, 35 Cal. 3d at p.221.) Tarkington offered no evidence or testimony showing positive assent by Fireman's Fund in the Plant audit to take on the heavy burden of a fiduciary duty towards an adversary whose bills it was contesting. Tarkington's evidence of the creation of Fireman's Fund's alleged fiduciary duty consists of conversations between itself and Commercial Union and the auditors and in follow-up correspondence authored by Tarkington's partners. Mr. Tarkington and Mr. O'Neill both testified that during the October 4, 1989 meeting at which the audit was announced, Commercial Union agreed that the audit would be confidential. However, Mr. Tarkington did not recall any discussions of fiduciary duties at the meeting. More than three months later, Mr. Tarkington sent a letter to the auditors, with a copy to Commercial Union, stating that "You, of course, recognize your fiduciary duties and obligations." On June 13, 1990, after Mr. O'Connor heard about the impending July 1990 *American Lawyer* announcement of the audit, he

protested in a letter to all of the carriers. In that letter, he claimed that the auditors and Commercial Union had agreed that the auditors and insurance carriers had a fiduciary obligation arising from the performance of the audit.

Tarkington also argues that the fiduciary duty was created during discussions and statements in letters to Fireman's Fund in connection with other audits. In the first audit, Mr. O'Connor had conversations about the insurer's audit policies with Fireman's Fund employees. Mr. O'Connor sent a follow up letter to the auditors, stating only that Fireman's Fund had fiduciary obligations, but not that Fireman's Fund agreed to them. Sometime in the last quarter of 1989, Tarkington again discussed audit policies with Fireman's Fund in connection with another case. Mr. O'Connor testified that in those conversations, an employee of Fireman's Fund agreed to the insurer's fiduciary role. Mr. O'Connor sent a letter dated March 6, 1990, confirming the agreement.

Even when we view this evidence in a light favorable to Tarkington, we cannot imply that Fireman's Fund knowingly undertook a fiduciary duty by failing to object to Tarkington's unilateral claims of a fiduciary relationship made in conversations and letters addressed to another entity, Commercial Union. Nor do we consider discussions about fiduciary duties in unrelated audits as substantial evidence of Fireman's Fund's knowing undertaking of a fiduciary duty in the Plant audit. The Supreme Court has described the burdens of a fiduciary obligation in the commercial context. "A fiduciary assumes duties beyond those of mere fairness and honesty in marketing its product he must undertake to act on behalf of the beneficiary, giving priority to the best interest of the beneficiary. (See Rest.2d Trusts (1959) §§ 2, 170.) A fiduciary's power to transact business with his beneficiary is severely limited; he must use the utmost good faith and, if he profits from the transaction, the law presumes the agreement was entered into by the beneficiary 'without sufficient consideration and under undue influence.' (Civ. Code, § 2235;

[Citations].) Such principles are generally inappropriate in a buyer-seller context, however disparate the party's resources." (*Committee on Children's Television, Inc., supra,* 35 Cal. 3d at p.222, fn. omitted.) It is difficult to reconcile Fireman's Fund's alleged fiduciary obligation to put Tarkington's interests before its own when the audit's purpose was to uncover evidence to benefit Fireman's Fund at the expense of Tarkington. With no evidence of Fireman's Fund's positive assent to a fiduciary duty in the Plant audit, we cannot conclude that Fireman's Fund has taken on such a heavy obligation.

Tarkington argues in the alternative that Fireman's Fund is liable for conspiring with Mr. Pahl to breach his own fiduciary duty as a former partner of Tarkington. The Supreme Court's recent clarification of the law of civil conspiracy precludes such liability. We agree with the holding in *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal. App. 4th 1571. "A nonfiduciary cannot conspire to breach a duty owed only by a fiduciary. 'Conspiracy is not an independent tort; it cannot create a duty .... It allows tort recovery only against a party who already owes the duty ... based on applicable substantive tort law principles.'" (*Id.* at p.1597, quoting *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 514.)

III. Appeals of Jury's Defamation Findings

A. Standard of Review

The parties dispute the standard by which we review the jury's defamation findings. Fireman's Fund emphasizes that the First Amendment is implicated in all defamation cases, and therefore we must independently review the factual findings of the jury. Tarkington contends that the jury's factual findings should be assessed according to the substantial evidence test. We agree with Tarkington, because this type of case does not call for the enhanced level of scrutiny and enhanced First Amendment protections afforded by de novo review.

The trial court properly concluded that this is a private figure, public issue case. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323; *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711). Tarkington contends that no public issue is at stake, but cites only its own argument that Fireman's Fund understood the information regarding billing practices to be confidential and a private concern. However, attorneys' billing practices are a public issue, because they determine the price paid by the public for attorneys' services. "Members of the public 'have an interest in matters which affect their roles as consumers.' [Citation.]" (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal. App. 4th 364, 377.)

In a private figure, public issue case, First Amendment rights are protected by converting the defense of truth into a positive requirement that the plaintiff bear the burden of proving falsity of the defamatory statement, as well as proving fault -- that the defendant was at least negligent in determining whether the statement was false -- before recovering damages. (*Philadelphia Newspapers, Inc. v. Hepps, supra*, 475 U.S. at p. 776.) Moreover, those damages may not include punitive damages without a showing of actual malice. (*Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749.) This case did not involve any issue of actual malice, because Tarkington did not seek punitive damages.

Because there was no issue of actual malice in this private figure case, we are not required to conduct an independent review of the entire record. "[T]his court must make an independent assessment of the entire record, but only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review." (*McCoy v. Hearst Corp.* (1986) 42 Cal. 3d 835, 842; see *McCoy v. Hearst Corp.* (1991) 227 Cal. App. 3d 1657, 1664-1665.) Fireman's Fund argues that *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485 (*Bose*) requires us to

"'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion of the field of free expression.'" (*Id.* at p. 499.) However, Bose a public figure case, merely adopted a de novo standard of review for the actual malice issue. (*Bose, supra,* 466 U.S. at pp. 508-511.) In contrast, the Ninth Circuit Court of Appeal concluded in *Maheu v. Hughes Tool Co.* (9th Cir. 1978) 569 F.2d 459 that the determination of substantial truth (which will be discussed below) should have been left for the jury rather than being decided by the court on summary judgment. (*Id.* at p.465, citing *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 489-490 [the constitutional requirement of a defense of truth "does not necessarily mean that the Court's rule regarding de novo review of a jury's finding of actual malice requires a similar factual review when the jury's finding concerns solely the truth of the statement"].) This case supports the California Supreme Court's restriction of independent appellate review to the issue of actual malice. (*McCoy, supra*, 42 Cal. 3d at p. 432.)

The dissent cites no case applying a de novo standard of review to the issue of the gist or sting of an untruthful statement made about a private figure. In contrast, the California Supreme Court has indicated its belief that a de novo standard of review applies only to the issue of actual malice. (*McCoy v. Hearst Corp., supra*, 42 Cal. 3d at p. 842.) We are not persuaded that we should depart from this language in McCoy and apply an independent standard of review to the issue of the gist or sting of an untruthful statement. Accordingly, we apply the normal standards of appellate review in this case.

Fireman's Fund appeals the denial of its motion for judgment notwithstanding the verdict. Therefore, we review the jury's findings to determine whether they are supported by substantial evidence. (*Shapiro v. Prudential Properly & Casualty Co.* (1997) 52 Cal. App. 4th 722, 730.) That standard of review does not entail automatic approval of the jury's findings. "While it is commonly

stated that our 'power' begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal 'was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.' [Citation.] '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value . . . .' [Citation.] The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.] While substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations.]." (*Kuhn v. Department of General Services* (1994) 22 Cal. App. 4th 1627, 1633, fn. omitted, italics in original.)

B. Fireman's Fund's Appeal of the Finding that the 785 Hour Billing Month Statement Was False

Fireman's Fund appeals the jury's finding that that the 785 hour billing month statement was false. It contends that under the common law doctrine of "substantial truth," Tarkington did not present sufficient evidence to support the jury's finding that the "gist" of the impossible billing month statement was false. Under California common law of defamation, "it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the 'gist' or 'sting' of the remark." (*Emde v. San Joaquin County Etc. Council* (1943) 23 Cal. 2d 146, 160 (*Emde*); see *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal. App. 4th 855, 870.) The United States Su-

preme Court recognized this doctrine in *Masson v. New Yorker Magazine, Inc., supra*, 501 U.S. 496. ". . . California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citation.]" (*Id.* at pp. 516-517.) The Court elaborated on how the doctrine should be applied in light of the First Amendment protections accorded to defamation defendants. "In this case, of course, the burden is upon petitioner to prove falsity. [Citation.] The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citations.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' [Citations.]" (*Id.* at p. 517.)

As *Emde* and *Masson* indicate, the substantial truth doctrine requires us to review the evidence proving the falsity of the defamatory imputation of the statement, not the falsity of the statement itself. "If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the *complexion of the affair* so as to affect the reader of the article differently than the actual truth would." (*Hearne v. De Young* (1898) 119 Cal. 670, 674, internal quotation marks omitted, italics added.) For example," ... in an arrest for burglary it would make no great difference what value the items bore. The sting of the article is the arrest of plaintiff suspected of burglary." (*Gantry Constr. Co. v. American Pipe & Constr. Co.* (1975) 49 Cal. App. 3d 186, 196.) In another example, the Court of Appeal held that allegations of tax fraud and tax evasion were substantially true, although plaintiff had pleaded nolo contendre to failure to file tax returns, because "... we cannot say the average reader would have

viewed the offenses differently, given the amount of gross income involved and the length of time it had gone unreported, had less colorful descriptions been chosen. [Citation.]" (*Jennings v. Telegram-Tribune Co.* (1985) 164 Cal. App. 3d 119, 127.)

Here, however, Fireman's Fund and Tarkington dispute the meaning of the defamatory imputation that arises from the statement that a Tarkington partner billed 785 hours in one month. Fireman's Fund contends that the defamatory imputation is that Tarkington overbilled, and the arbitrator's finding of instances of overbilling requires us to hold that the overbilling imputation is true. Under Fireman's Fund's logic, there are no degrees of overbilling; any true examples of overbilling by a law firm would preclude defamation liability for a false accusation of overbilling, no matter how egregious, by the same law firm. In contrast, Tarkington contends that the outrageousness of the 785 hour billing month statement created the defamatory imputation that the law firm had defrauded Fireman's Fund, and that substantial evidence supports the jury's conclusion that it did not do so. We are therefore faced with two possible defamatory meanings for the statement. The first meaning, overbilling, cannot be libel because it is substantially true; Tarkington is collaterally estopped from challenging the arbitrator's uncontested finding of overbilling. The second meaning, fraud, is at least potentially libelous as substantially false; the arbitrator did not find that Tarkington had defrauded Fireman's Fund.

If a statement is ". . . susceptible of two interpretations -- one innocent, one defamatory -- it is for a jury and not a court to make the choice between conflicting interpretations. [Citations.]" (*Yorty v. Chandler* (1970) 13 Cal. App. 3d 467, 475.) First, however, the court must determine whether the statement is reasonably susceptible of the defamatory interpretation suggested by the plaintiff. (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal. 2d 536, 546; see Rest.2d Torts, § 614 (1977).) "The issue is one of fact, whether, when the statements are given a fair,

natural and reasonable construction, average persons of ordinary intelligence would attribute to the statements a defamatory import, present either explicitly or implicitly." (*Stoneking v. Briggs* (1967) 254 Cal. App. 2d 563, 571.)

We conclude that the 785 hour billing month statement is reasonably susceptible to Tarkington's interpretation that it imputed fraud. A numerically precise allegation that an insurer discovered that a law firm billed an impossible number of hours for an entire month can reasonably be understood by the average reader to accuse the law firm of defrauding the insurer. Of course, the 785 hour billing month statement does not demand that interpretation. It is also reasonable that the statement imputes only nonfraudulent overbilling of the type that the arbitrator determined Tarkington had committed. This court's responsibility, however, is limited to determining the reasonableness of the two interpretations, and then assessing whether the jury's decision was supported by substantial evidence. ". . . [I]f; in the opinion of the court, the question is one on which reasonable men might differ, it is for the jury to determine which of the two permissible views they will take." (Rest.2d Torts, § 614, com. d (1977).)

Following *Masson*, we review the evidence to determine whether a reasonable jury could conclude that the 785 hour billing month statement imputed billing fraud that "'would have a different effect on the mind of the reader. . .'" (*Masson, supra*, 501 U.S. at p.517) than the true overbilling uncovered by the Plant audit report. The Restatement Second of Torts examined the issues raised when two different types of misconduct are involved. "It is not enough that the accused person is found to have engaged in some other substantially different kind of misconduct even though it is equally or more reprehensible. Thus a charge of burglary against another is not justified by the finding that he has committed a murder. However, many charges are made in terms that are accepted by their recipients in a popular rather than a technical sense. Thus a charge of theft may be reasonably interpreted as charging

any form of criminally punishable misappropriation, and its truth may be established by proving the commission of any act of larceny or embezzlement." (Rest.2d Torts, § 581A, com. f (1977). See also *Handelsman v. San Francisco Chronicle* (1970) 11 Cal. App. 3d 381, 387-88) "[T]he question of whether the defamatory imputations are true (see § 581A) is ordinarily for the jury .... [H]owever, if the evidence is so overwhelming that any other conclusion would be unreasonable, the court may direct the jury to make the proper finding." (Rest.2d Torts, § 617, com. a (1977).)

Tarkington presented substantial evidence to support the inference that the charge that a Tarkington partner had billed 785 hours in one month was accepted by the readers of the articles as describing fraudulent conduct which was substantially different from the true overbilling of the type uncovered by the audit. Mr. Schratz himself distinguished between fraud on the one hand, and overbilling on the other. Mr. Schratz and Mr. Black of Fireman's Fund testified that overbilling was common. Regularly hired "panel counsel" for Fireman's Fund overbilled by an average of 20 percent before the Tarkington dispute became public. Fireman's Fund's own in-house firm which took over the Plant litigation from Tarkington was found in an audit to have overbilled Commercial Union $153,881.96 out of $1,401,579.15, or approximately 11 percent. Two expert witnesses called by Tarkington, Mr. Steven Gurnee, who served as President of the Association of Defense Counsel for Northern California, and Mr. Anthony Robinson, a former claims executive with Fireman's Fund who had also been employed in senior claims supervisorial capacities with several other Bay Area insurers, distinguished between common forms of overbilling and the extreme allegation of impossible billing hours.

Tarkington also presented substantial evidence that the true overbilling was not fraudulent, but instead was an unintended consequence of the spread billing system. Its witnesses explained that the complexities of the spread

billing system led to inevitable misbilling, including both overbilling and underbilling. The insurers' consortium directed Tarkington to spread the minimum amount of time to the maximum number of cases as possible. As a result, the firm had to prepare thousands of small-increment bills and enter thousands of time entries on a monthly basis. This increased the number of time sheets 20 to 30 times, so that each month the thousands of separate bills stacked 8 to 10 inches high. It was difficult for each timekeeper to find the closest cases to which to bill general time. Occasionally timekeepers unfamiliar with the system would mistakenly put in too many entries. For example, one paralegal worked on the cases for only one day and mistakenly billed 0.1 hours to hundreds of files. The multiple small increment bills made it difficult for supervising attorneys to catch mistakes.

The arbitrator did not rule that the overbilling uncovered by the audit was fraudulent. The arbitrator concluded that Tarkington did not overcharge Fireman's Fund for the legal services provided defending Plant. His findings state that Fireman's Fund "adduced no evidence to dispute adequacy of [Tarkington's] representation of the client, Plant, or that over all charges were reasonable. And a number of prominent opposing (plaintiff) asbestos counsel opined that [Tarkington] was among the top asbestos defense firms in the area of competence, integrity and economy of use of staff. Evidence was also offered tending to show that while [Tarkington] handled the cases the cost of defense per case was lower than average in the area." However, the arbitrator did conclude that Tarkington frequently overbilled Fireman's Fund on specific tasks. "[T]he cumulative effect of the evidence which was adduced is to convince one that the use to which spread billing was put resulted in substantial over statement of the time expended in performing many tasks, and that little care was taken to curb such a tendency." He deducted 20 percent from all outstanding bills as a rough estimate of the impact of the overbilling. However, that deduction was based on a theory of constructive fraud under Civil Code section 1573

based on the fiduciary duty owed by Tarkington as Fireman's Fund's attorney. Other evidence demonstrating the inherent difficulties created by the spread billing requirement could have been accepted by a reasonable jury as a satisfactory explanation that the systematic overbilling was not the result of an effort to defraud Fireman's Fund.

Tarkington countered each specific occurrence of overbilling found in the audit with evidence and testimony showing that in each instance it did not intend to defraud Fireman's Fund. For example, the arbitrator deducted Tarkington's fees for examples of what he determined was unit billing, unallowable under the fee agreement between Tarkington and Fireman's Fund. Tarkington presented evidence that it was only attempting to estimate total hours on projects involving very small amounts of time spent on thousands of files. It also presented testimony that its estimates may not have captured all the time spent on those projects. The single example cited by the audit that most closely approaches fraud was one partner's authorization of a paralegal to prepare the partner's timesheets. Even this example was explained by Tarkington as a reasonable method of estimating the partner's time, because the paralegal had worked side by side with the partner on all of his asbestos work and thus was expected to be able to fairly record the partner's time.

Tarkington presented substantial evidence that, in the aggregate, it undercharged Fireman's Fund for its legal services on the Plant case. The firm customarily reduced charges on its invoices before billing, up to 30 percent for Fireman's Fund. In one year, Tarkington cut about $1,000,000 from its prebills. The firm typically would assign only one attorney to a particular set of tasks, when other firms might customarily use four or five. A former Tarkington asbestos attorney, Ms. Donna Cropp Bechman, testified that she was told to record less time than the actual time spent on one asbestos trial. Fireman's Fund's own expert, Mr. Gene Brown, testified that the cause of the firm's financial troubles was that it charged too little for its

services. In fact, before the Plant dispute, Fireman's Fund claims department personnel complimented Tarkington on its economic resolution of cases. Tarkington also presented evidence of underbilling caused directly by the spread billing system. Timekeepers neglected to bill on many occasions, because of the difficult and time-consuming nature of the billing. Mr. Gerard Garcia testified that he had to stop billing his work as a calendaring paralegal, because the demands of the spread billing system left him no time to prepare timesheets for his own work.

In sum, we conclude that Tarkington presented substantial evidence that the gist or imputation of the 785 hour billing month statement was false and defamatory. Tarkington did overbill Fireman's Fund, but we cannot overturn the jury's conclusion that the 785 hour billing month statement went beyond an implication of overbilling and conveyed the false and defamatory imputation that Tarkington defrauded Fireman's Fund. "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." (*Maheu v. Hughes Tool Co., supra,* 569 F.2d 459, 467, quoting *Tennant v. Peoria & P.U. Ry. Co.* (1944) 321 U.S. 29, 35.)[2]

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[2] Fireman's Fund also argues that we should review the denial of its summary judgment motion. Although summary judgment is a favored remedy in defamation causes of action involving the constitutional issue of actual malice *(Reader's Digest Assn.* v. *Superior Court* (1984) 37 Cal. 3d 244, 252), there is no such issue in this case. We also decline to review the order denying summary judgment, because the denial of a defense motion for summary judgment cannot be challenged on appeal if a jury later finds for plaintiff. *(Waller* v. *TJD, Inc.* (1993) 12 Cal. App. 4th 830, 833.)

The dissent ignores this axiom when it refuses to accord any deference to the jury's implicit finding regarding the "gist" or the 'sting" of the 785 hour billing month statement, namely, that Tarkington defrauded Fireman's Fund. Rather the dissent adopts its own view of what the "gist" or the "sting" of the challenged statement was: that Tarkington overbilled Fireman's Fund. Having replaced its judgment for that of the jury, the dissent does not hesitate to find its preferred meaning of "gist" or "sting" to be true.

The dissent also contends that the gist of the 785 hour billing month statement can be decided by this court as a matter of law. We disagree. First, we note that none of the decisions cited by the dissent reversed a jury verdict. In *Heuer v. Kee* (1936) 15 Cal. App. 2d 710, 712-714, *Hayward v. Watsonville Register-Pajaronian and Sun* (1968) 265 Cal. App. 2d 255, 256-260 and *Handelsman v. San Francisco Chronicle, supra*, 11 Cal. App. 3d at pages 387-389, the appellate court affirmed the findings of the trier of fact that the report at issue in each case was substantially fair and true. Similarly, in *Jennings v. Telegram-Tribune Co.* (1985)164 Cal. App. 3d 119 and *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal. App. 4th 855, the appellate court upheld the trial court's decisions in favor of the defendants. The decision in *Hearne v. De Young, supra*, (1898) 119 Cal. 670, also cited by the dissent, supports rather than refutes our conclusion. In *Hearne*, the appellate court remanded the action for a new trial because the trial court had not permitted certain evidence to go to the jury regarding the truthfulness of the "gist" of an allegedly defamatory written statement. (*Id.* at p. 676.)

Moreover, each case cited by the dissent involves facts different from those presented here. Some allegations of defamation are necessarily more compelling than others. (See, e.g., *Jennings v. Telegram-Tribune Co., supra*, 164 Cal. App. 3d 119.) Under the facts presented in this case, we conclude that the issue is not one that may be decided as a matter of law.

C. Tarkington's Appeal of the Finding that Mr. Schratz's Sonoma County Bar Association Speech Was Not False

Tarkington also appeals a substantial truth finding. It seeks reversal of the ruling on summary judgment that the claimed defamatory statement in Mr. Schratz's speech to the Sonoma County Bar Association is substantially true. Tarkington argues that the speech falsely stated that one Tarkington lawyer billed one-tenth or two-tenths of an hour to 4,000 files.

We affirm the trial court's ruling that the disputed language is substantially true. The speech suggests that a single lawyer could take advantage of spread billing to bill to 4,000 files on a single day, but it does not state that such billing occurred. In addition, two of the audit findings resemble the activity described in Mr. Schratz's speech. Tarkington completed a two to three week project to review about 5,000 cross-complaints for possible dismissal required by a change in the law. The effort was headed by an attorney not normally assigned to the Plant litigation, and he billed one-tenth of an hour to each of the 3,000 cases that were dismissed. The aggregate was more than the amount of time he actually worked. In another project, Tarkington amended 3,000 cross-complaints, and then retroactively billed 0.2 hours to the 3,000 files over the six weeks the project took place. This was later disallowed as an improper unit charge. These irregularities discovered by the audit have the same effect on the mind of the reader as the problems described by Mr. Schratz's speech. Therefore, we conclude that Tarkington did not create an issue of triable fact as to the substantial truth of the Sonoma Bar Association speech.

D. Fireman's Fund's Appeal of the Finding That It Was the Source of the 785 Hour Billing Month Statement

In a separate challenge to the trial court's denial of the motion for a judgment notwithstanding the verdict, Fire-

man's Fund contends that there is no evidence that Mr. Schratz was the source of the 785 hour billing month statement. It also contends that there is no evidence to support Tarkington's theory that Schratz and Pahl had entered into a conspiracy to defame the firm. Our review of the evidence leads us to conclude that substantial evidence supports the jury's verdict that Mr. Pahl was the ultimate source of the defamatory statement, and Mr. Schratz of Fireman's Fund conspired with Mr. Pahl to use that statement to defame Tarkington.

Tarkington presented substantial evidence that the ultimate source of the 785 hour billing month statement was Mr. Pahl. Mr. Pahl called Mr. O'Connor immediately after Mr. Pahl was first contacted by Mr. Schratz, and threatened to disclose that computer-generated firm management reports indicated that a Tarkington partner had billed 785 hours in a single month. Mr. Pahl quickly changed his 785 hour billing month into an 893 hour billing month, and then always used the 893 hour figure.

Tarkington's evidence also showed that Fireman's Fund had reason to doubt the 785 hour billing month allegation. At a January 24, 1991 meeting, Mr. Pahl told Mr. Schratz that Mr. O'Connor and Mr. Tarkington routinely billed 600 to 700 hours a month by spreading time to numerous files. He also made the specific 893 hour billing month allegation to Mr. Schratz for the first time. Mr. Schratz then released Mr. Pahl from any claims by Fireman's Fund against Tarkington. That spring, however, Mr. Pahl retracted his claims. He denied the statement that the Tarkington partners routinely billed 600 to 700 hours a month, and retracted the 893 hour billing month. Later, however, he reaffirmed the single high billing month statement, but asserted that it was not connected to the Plant litigation.

Tarkington's evidence was substantial that Mr. Schratz cooperated with Mr. Pahl to publicize the impossibly high billing month in *The Recorder*. Before *The Recorder* article was published, Mr. Schratz talked on the phone with its author three times and met with him for 30 to 45 minutes.[3] At the same time, Fireman's Fund sought a written confirmation from the equivocating Mr. Pahl that there was an impossibly high billing month, and gave Mr. Pahl a formal release from liability for overbilling in order to secure that confirmation. *The Recorder* article appeared the day after Mr. Schratz received Mr. Pahl's formal confirmation.

The evidence of Mr. Schratz's responsibility for *The Wall Street Journal* statement about the 785 hour billing month statement was also substantial. The author interviewed Mr. Schratz extensively before the article was published, but spoke little with Mr. Pahl. Mr. Schratz testified that he referred *The Wall Street Journal* reporter to *The Recorder* article. After Tarkington's retraction demand, Mr. Schratz told the reporter to "go back and read *The Recorder* article very carefully, and see where there was a mistake about how *The Recorder* article referred to the 785 hours, as opposed to how we referred to it." (Italics added.) When the author later told Mr. Schratz that *The Wall Street Journal* was going to retract that statement, Mr. Schratz responded that he would not do so. Mr. Schratz then spoke to the author of *The Recorder* article, and told him that *The Wall Street Journal* was being threatened with a defamation suit because its reporter was

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[3] Neither party subpoenaed the testimony of the author of this article or the later *Wall Street Journal* article (described below), because they believed the authors would have refused to disclose their sources, relying on Evidence Code section 1070, article I, section 2 of the California Constitution, or the common law qualified privilege for communications to the media.

not as careful as *The Recorder* on the details of the 785 hour billing month allegation.

We conclude that the evidence supporting the jury's conclusion that Fireman's Fund conspired with Mr. Pahl to publicize the 785 hour billing month statement supports the jury's verdict. The evidence, although circumstantial,[4] taken as a whole would permit a reasonable trier of fact to conclude that Fireman's Fund alone, or in agreement with Mr. Pahl, informed *The Recorder* and *The Wall Street Journal* that a Tarkington partner had billed 785 hours in a single month. Therefore, we affirm the jury's verdict finding Fireman's Fund liable for defamation.

E. Fireman's Fund's Appeal of the Denial of Its Motion for a New Trial on Defamation

Fireman's Fund contends that the trial court should have granted its motion for a new trial on defamation after it granted the judgment notwithstanding the verdict on the fiduciary duty claim. It argues that there should be a new trial of the defamation cause of action because the jury decided the defamation cause of action at the same time it was considering the breach of fiduciary duty cause of action that the trial court later ruled should not have gone to the jury. Fireman's Fund complains that it is impossible to determine whether the jury's award of a single sum -- $3 million -- is based on the groundless breach of fiduciary duty claim. We hold that the trial court did not err in deny-

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[4] Amicus Curiae California Newspaper Publishers Association argues that we should require direct evidence to identify the source of a defamatory statement made to a newspaper reporter that is protected by a privilege for communications to the media. We do not consider this issue because it was not raised by Fireman's Fund on appeal. *(California Assn. for Safety Education* v. *Brown* (1994) 30 Cal. App. 4th 1264, 1274-1275.)

ing the motion for a new trial on defamation, because the two causes of action are legally independent of one another, and the special verdict form demonstrated that the jury had separately found in favor of Tarkington on the defamation cause of action.

Fireman's Fund's argument relies on cases involving inconsistent instructions and general verdicts that are not applicable here. *Henderson v. Harnischfeger Corp.* (1974) 12 Cal. 3d 663 (*Henderson*) held that the trial court's proper instruction on the assumption of risk defense in a wrongful death action was "contradictory and irreconcilable" with an erroneous instruction requiring plaintiff to prove decedent's lack of knowledge of the claimed defect in a cause of action for strict liability. (*Id.* at p. 671.) Unlike this case, *Henderson* was tried on a single theory -- strict liability. The Supreme Court declared that "[w]e are not dealing with separate and independent counts or causes of action and the sufficiency of evidence on any one of them. Nor are we dealing even with separate issues, so independent in nature and isolated in content as to preclude any interrelationship between them." (*Id.* at p. 674.) In this case, there is no legal inconsistency between the breach of fiduciary duty and defamation causes of action; they are separate and independent causes of action whose elements bear no logical relationship to one another. Furthermore, the special verdict form in this case allowed the jury to demonstrate its independent evaluation of each cause of action. The *Henderson* general verdict did not allow the Supreme Court to determine what the jury's conclusions were on the two inconsistent instructions. (*Id.* at p. 673.)

Similarly, the existence of a special verdict form allowing the jury to express its independent conclusions about the two causes of action distinguishes this case from the cases involving general verdicts that require reversal because the appellate court cannot determine whether the verdict was the result of an erroneous instruction. For example, in *Cobbs v. Grant* (1972) 8 Cal. 3d 229 the Su-

preme Court reversed the trial court's negligence instruction, but assumed that an instruction on failure to obtain informed consent was proper. (*Id.* at p. 238.) It was required to reverse the general verdict, since it was "impossible to determine on which theory the jury verdict rested . . ." (*Ibid.*) Here, it is possible to determine that the jury found Fireman's Fund liable for defamation, so it is unnecessary to reverse the verdict.

IV. Fireman's Fund's Appeal of the Denial of Its Motion for a New Trial on Damages Based on the Special Verdict's Failure to Allocate Damages Between the Breach of Fiduciary Duty and Defamation Claims

Fireman's Fund contends that the verdict should be reversed because it does not allocate damages between the fiduciary duty and defamation claims. Preliminarily, we must address Tarkington's argument that Fireman's Fund waived all error relating to the question of unallocated damages on the special verdict form because the record does not contain any alternative special verdict form proposed by Fireman's Fund. Although Fireman's Fund presented an initial proposed special verdict form that apparently allocated damages between the causes of action, there is no record of Fireman's Fund's objection to the special verdict form used at trial. Fireman's Fund did, however, protest that a general verdict on damages which failed to provide for a separate assessment of damages for each cause of action might result in a verdict which would not withstand appellate review.

We note that "[w]aiver is not found where the record indicates that the failure to object was not the result of a desire to reap a 'technical advantage' or engage in a 'litigious strategy.'" (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal. 2d 452, 456, fn.2, citations omitted.) Tarkington described no such motive. On this record, we hold that Fireman's Fund did not waive its objection.

Fireman's Fund argues that it is impossible to determine from the damages verdict which damages were awarded for the reversed breach of fiduciary duty claim, and which damages were awarded for the defamation claim. We agree. The fiduciary duty claim permitted the recovery of damages for a wide variety of statements that were not defamatory. Mr. O'Neill testified that the claimed "decline in fortunes" of Tarkington resulted in part from "the release of confidential information from the audit." Tarkington's counsel directed the jury to *The Wall Street Journal* article in arguing that Fireman's Fund could be liable for revealing even true information from the audit: "That is not necessarily defamatory, but is a breach of confidence." Mr. O'Connor related Tarkington's profitability decline in part to the "breaches of confidence that are involved in this case." On this record, no reasonable objective determination can be made that the $3 million verdict does not include damages for the breach of fiduciary covenant the jury was erroneously permitted to decide had occurred. Accordingly, we conclude that it was error to deny Fireman's Fund's motion for new trial on the issue of damages and remand this action for retrial on the issue of damages. (Cf. *DeTomaso v. Pan American World Airways, Inc.* (1987) 43 Cal. 3d 517, 533; *Henderson v. Harnischfiger Corp., supra*, 12 Cal. 3d at pp. 673-674.)

V. Tarkington's Appeal of the Damages Offset for the Pahl Settlement

Tarkington contends that the trial court improperly granted an offset of the entire pretrial settlement between itself and Mr. Pahl against Fireman's Fund's damages. While this issue is technically moot, a similar issue will arise if this matter is retried and damages are awarded to Tarkington. We therefore provide the following guidance to the trial court.

Fireman's Fund requested an offset under Code of Civil Procedure section 877. Under section 877, a party seeking to justify an allocation of settlement proceeds to the detriment of a nonsettling defendant must present evidence

supporting the allocation. "Where the settling parties have agreed to allocate less than all of the settlement amount to a portion of the causes of action, an evidentiary showing is required to justify such allocation. [Citation.] The effectiveness of such an allocation depends upon its good faith. 'The statutory requirement of good faith extends not only to the amount of the overall settlement but as well to any allocation which operates to exclude any portion of the settlement from the setoff. [Citations.]'" (*Erreca's v. Superior Court* (1993) 19 Cal. App. 4th 1475, 1491.) The evidence must show that the allocation was the product of an adversarial process. "A party seeking confirmation of a settlement must explain to the court and to all other parties, by declaration or other written form, the evidentiary basis for any allocations and valuations made, and must demonstrate that the allocation was reached in a sufficiently adversarial manner to justify the presumption that a reasonable valuation was reached. [Citation.]" (*Id.* at pp. 1495-1496.)

We cannot be certain what type of evidentiary record Tarkington will make if this issue is presented to the trial court again. We note, however, that on the basis of the current record, we would conclude that Tarkington made no evidentiary showing justifying the allocation besides its agreement with its own partners. The distribution of the money among the plaintiffs, and to the detriment of Fireman's Fund, was made by the plaintiffs alone without the adversarial participation of Mr. Pahl. Thus, based on this record, we would conclude that the trial court properly ruled that Fireman's Fund was entitled to a setoff of the entire settlement figure. (*Knox v. County of Los Angeles* (1980) 109 Cal. App. 3d 825, 836.)

Fireman's Fund also appeals the trial court's admission of evidence that Fireman's Fund spent $3 million in legal fees litigating its billing dispute with Tarkington. Given our conclusion that we must order a new trial on damages, we cannot now address this remaining damage issue.

DISPOSITION

We reverse the jury verdict with respect to the award of damages. We remand this action for a new trial on the amount of damages caused by the defamation only. In all other respects we affirm the judgment. Parties to bear their own costs on appeal.

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Jones, J.

I concur:

_____
Haning, J.

Tarkington, O'Connor & O'Neill v. Fireman's Fund Insurance Company - A077091

Concurring and Dissenting Opinion of Peterson, P.J.

I concur with these conclusions of the majority opinion: that Tarkington, O'Connor & O'Neill (Tarkington) overbilled its client, Fireman's Fund Insurance Company (Fireman's Fund), for legal services (p. 22); that Tarkington had no cause of action against Fireman's Fund for either breach of fiduciary duty or breach of confidentiality because Fireman's Fund complained of these overbillings (pp. 10 & 7-8); that the trial court's error in admitting evidence concerning those causes of action and in instructing thereon resulted in a tainted, unsegregated verdict (pp. 28-29); and that a speech of a Fireman's Fund representative to the Sonoma County Bar Association, including complaints about Tarkington's overbilling, was truthful and cannot be the basis for a defamation claim (p. 24).

I respectfully dissent, however, from the mistaken analysis of the majority on which its remand is based.

My colleagues find the case at bench to implicate defamation of a private party on a matter of public interest. They hold a jury's conclusion–that a literally untrue statement is defamatory–is final and exempt from independent de novo appellate review if there is no contention the statement was made with actual malice. (Maj. opn., *ante*, at pp. 13-15.) Thus, the majority precludes an appellate court from determining on independent record review whether that literally untrue statement comprises the substance, gist, or sting of a truthful charge–client overbilling–and is, therefore, legally immune from a defamation claim.

I would hold that we are compelled to conduct a de novo review of the record to determine independently whether the statement the jury found defamatory–that a Tarkington timekeeper billed Fireman's Fund for 785 hours in one month–comprised the gist or sting of the con-

cededly true charge that Tarkington overbilled Fireman's Fund by several hundred thousand dollars, in the course of which an arbitrator found Tarkington committed constructive and actual fraud. (See part I.E., *post*.) Such review is not dependent on the presence of an actual malice issue. as the majority posits. (Pp. 13-14.) To the contrary, that review is mandatory simply because constitutional free speech guarantees preclude defamation liability for utterances or publications comprising the substance, gist, or sting of a truthful statement. Where such constitutional free speech rights are, thus, implicated, courts do and must protect them by insisting on judicial control of a jury's decision by such de novo review.

On conducting that review, I would wholly reverse the judgment and remand with instructions to grant the motion of Fireman's Fund for judgment notwithstanding the verdict (JNOV). The alleged defamatory statement, although literally untrue, is simply the gist or sting of an undisputedly truthful charge–client overbilling–and is constitutionally protected from claims of defamation.

Additionally, the trial court's error in allowing Tarkington, over proper objection, to present evidence that Fireman's Fund spent $3 million in legal fees litigating the underlying fee dispute with Tarkington–a figure which should never have been placed in evidence, and which immediately and prejudicially reappeared as the jury's damage award in this case–also requires reversal of the judgment.

I. A Citizen's First Amendment Rights Are Throttled by the Majority's Ruling That Media Reports of a Citizen's Literally Untrue Statement That Is the Substance, Gist, or Sting of a Truthful Charge, Can Expose the Citizen to Defamation Liability

This case raises troubling issues concerning the potential erosion of rights of free speech. The majority opinion holds that even a minor inaccuracy in commenting on an issue of admitted public importance can result in a huge

award for defamation damages. That ruling subverts federal and state constitutional rights to speak or write with reasonable accuracy on matters of public importance without fear of retribution by litigation. My colleagues have revived an old and properly discarded rule, amounting to strict liability for any minor inaccuracy of speech which might be misinterpreted by a specialized audience as being somehow defamatory. This result, if allowed to stand by higher courts, would result in an unwarranted chilling of the rights to free expression guaranteed by the First Amendment of the federal Constitution and article I, section 2 of the California Constitution, leading to the suppression of speech on matters of public concern.

In cases involving the issue of whether a literally untrue or erroneous statement on a matter of public concern comprises the gist, substance, or sting of the speaker's truthful charge, constitutional issues of protected speech are necessarily implicated. A substantially true statement comprising the gist or sting of a truthful statement may not be sanctioned by a civil verdict.

Both federal courts and those of this state have recognized for decades that because any citizen, whether public official or private citizen, has the constitutionally protected right to freely speak the truth, that right may not be irrevocably stripped away by a finder of fact. An appellate court has the duty to exercise its independent judgment in determining de novo if the challenged statement is immune from a defamation claim because it represents the gist or sting of a constitutionally protected truthful statement. This duty, though in part dependent on issues of fact which in many cases we ordinarily review on a deferential substantial evidence test, must be exercised here because the stakes regarding curtailment of free speech of our citizenry, "in terms of impact on future cases and future conduct–are too great to entrust ... finally to the judgment of the trier of fact." (*Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 501, fn. 17 (*Bose*).)

A. The Majority's Erroneous Analysis of the Review Duties of Appellate Courts When Constitutional Free Speech Issues Are Implicated in a Gist or Sting Issue

The majority opinion correctly recognizes that the reported charges of numerous overbillings by Tarkington were substantially true. (Pp. 19-22.) The majority likewise correctly determines that these are matters of public concern. (Pp. 13-14.) As the majority opinion also correctly points out, an inaccuracy on a matter of detail is not libelous if the gist or sting of the statement is substantially true. (Pp. 16-17.) This doctrine of substantial truth serves important interests under both the First Amendment and the California constitutional free speech provisions. The substantial truth doctrine protects freedom of discourse without fear of liability for technical misstatements, which might be almost unavoidable in the course of carrying a message which is substantially true. "'[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive. (*Bose*, *supra*, 466 U.S. at p. 513.)

The majority's misanalysis and rejection of our duty of independent review in this case begins with its quotation of language from *McCoy v. Hearst Corp.* (1986) 42 Cal. 3d 835, 842 (*McCoy*): "'[T]his court must make an independent assessment of the entire record, but only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review.'" (Maj. opn., *ante*, at p. 14, italics added.) Relying on the italicized language, the majority concludes that "Because there was no issue of actual malice in this private figure case, we are not required to conduct an independent review of the entire record." (*Ibid.*)

Initially, the *McCoy* reference in the italicized language to "Issues apart from this constitution question [actual malice]" referred to issues before that court in that case.

McCoy did not, as the majority implies, adopt a generic rule that independent appellate review is unnecessary in a defamation case unless an issue of actual malice is presented. The *McCoy* issue was whether a defamatory falsehood was made by a newspaper against official police conduct with knowledge of or reckless disregard of whether such statement was false. No such issue exists in the case at bench. The issue here is whether an admittedly erroneous statement–that one attorney billed 785 hours in a month–comprises the gist or sting of the charge of Tarkington's admitted overbilling of Fireman's Fund.

The *McCoy* court actually acknowledged that where an issue relates to First Amendment guarantees, such as the issue of actual malice in that case or the issue of substantial truth in this case, an independent review is required. (42 Cal. 3d at p.844.) While noting that the only issue then before it requiring independent review was the issue of actual malice, the *Mc Coy* court also emphatically recognized that the federal Supreme Court has identified many other "issues which, even though largely factual in nature, entail stakes of such constitutional magnitude that they may not be entrusted 'finally to the judgment of the trier of fact.'" (*Ibid.*, quoting from *Bose, supra*, 466 U.S. at p. 501, fn. 17.)

McCoy further noted that the rule of independent review is not limited to the question of actual malice in a defamation case, as the majority opinion mistakenly indicates, but that there are many "other types of First Amendment cases in which the factfinder's interpretation of the evidence is subject to independent appellate reevaluation." (42 Cal. 3d at p.844.) Finally, the *McCoy* court observed that the argument for independent review is strongest where, as here, a jury verdict is challenged on free speech grounds: "[T]his court agrees with amici curiae... that *Bose* supports the proposition that the de novo rule of review applies with special force to jury verdicts. There is a greater danger that the jury will ignore the limits of the First Amendment, find for the plaintiff out of sympathy, or find against the

defendant out of hostility to speech that ought to be protected." (P. 844, fn. 6.) That, of course, on this record, is precisely the reason why we must conduct an independent review.

The majority relies on *Philadelphia Newspapers v. Hepps* (1986) 475 U.S. 767, 776 (*Hepps*) for the proposition that First Amendment rights are protected in a private figure, public issue case by "converting the defense of truth into a positive requirement that the plaintiff bear the burden of proving falsity of the defamatory statement, as well as proving fault–that the defendant was at least negligent in determining whether the statement was false . . . ." (Maj. opn., *ante*, at p.14.)

The clear implication the majority attaches to this analysis of *Hepps* is that because the federal Supreme Court established the burden of proving falsity and fault on a plaintiff in a defamation action, no further inquiry need be made by a reviewing court of whether the jury's verdict violates the speaker's constitutional free speech protection by penalizing speech that is substantially true: in short that if a statement's falsity is established by substantial evidence, the inquiry ends and a reviewing court may not independently examine the record to determine if the literally false statement, for which a jury awards defamation damages, is nonetheless entitled to constitutional free speech protection as expressing the gist or sting of an underlying statement or charge. Carried to its logical extension, this startling proposition would mean that a witness stating a husband hit his wife with a stick is exposed, without judicial oversight, to a jury's defamation award if the husband proves he hit his wife with a gun. As I explain, *post*, absurdities such as this were buried a century ago by our own Supreme Court. (See *Hearne v. De Young* (1898) 119 Cal. 670, 673-676 (*Hearne*).)

I stress that these legal questions concerning the immunity of gist and sting remarks from defamation claims are matters of vital public concern. In holding that the common law rules relating to defamation actions must be

reformed, to place the burden of proving falsity on the plaintiff the *Hepps* court noted: "'Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.'" (475 U.S. at p. 787, quoting *Garrison v. Louisiana* (1964) 379 U.S. 64, 74.). By the same token, appellate courts must conduct, and in fact have conducted, independent review on the constitutional question of truth or substantial truth. (See, e.g., *Hearne, supra*, 119 Cal. at pp. 673-676; *Haynes v. Alfred A. Knopf, Inc.* (7th Cir. 1993) 8 F.3d 1222, 1232-1234 (*Haynes*).)

Finally, the majority relies on *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496 (*Masson*) for its contention that the issue of whether a defendant's erroneous statement nonetheless comprises the substance of a true statement is always a common law issue, bereft of independent appellate review requirements of the First Amendment and of article I, section 2 of the California Constitution. *Masson* simply held that direct quotations (included in quotation marks) which were attributed by a journalist to an analyst in the challenged article, contained a sufficient degree of falsity to prove actual malice, and defeat a summary judgment motion in a public interest public figure defamation action. (Pp. 516-525.) No issue of gist or sting was there raised. The truth or falsity of the alleged defamatory material was disputed, and the standard of appellate review in the context of the case at bench was not there discussed.

Masson dealt with rule 56 of the Federal Rules of Civil Procedure (28 U.S.C.) in seeking to define the proper scope of summary judgment. Since there was no jury verdict in issue in *Masson*, the question of the proper standard of review for jury verdicts or jury verdicts implicating First Amendment protection never arose. However, the *Masson* court applied independent review in any event, holding that, even under the very difficult standard of rule 56, the issue of substantial truth was not necessarily always reserved for the jury, but could be determined as a

matter of law, in some cases prior to trial. The *Masson* court agreed with certain of the Ninth Circuit's rulings, also on independent review, that certain quotations were substantially accurate, although the high court disagreed with others, on the high court's own independent review of those quotations. (501 U.S. at pp. 516-525.) In *Masson*, unlike this case, there were some relevant issues of fact as to the truth or falsity of the journalist's statements, but no such factual questions exist here. Certainly, *Masson* does not support the majority's opinion that only a substantial evidence review is here required; the gist or sting issue here is clearly subject to de novo review under *Bose*.

The only case which contains language that might arguably support the majority's conclusion is the obviously outdated dictum contained in an older Ninth Circuit decision, *Maheu v. Hughes Tool Co.* (9th Cir. 1977) 569 F.2d 459, 465. The *Maheu* court in fact reversed a jury verdict for the plaintiff in a defamation case, because the trial judge committed prejudicial error by making improper remarks to the jury during the trial. (Pp. 471-472.) The *Maheu* court's carefully restricted dictum, that federal Supreme Court precedent "does not necessarily mean that the Court's rule regarding [de novo] review of a jury's finding of actual malice requires a similar factual review when the jury's finding concerns solely the truth of the statement" (p. 465), may have been an accurate summary of the lack of clarity of applicable precedents 21 years ago, in 1977, but the dictum is obviously no longer accurate in light of the federal Supreme Court's 1984 decision in *Bose* and our own high court's 1986 decision in *McCoy*.

B. California and Federal Authority Mandate Our Independent Review of This Record

The leading California case–*Hearne, supra*, 119 Cal. 670–although decided before later cases considering constitutional free speech implications of gist and sting statements contended to be defamatory, reached the same result 100 years ago which those later cases posit. In fact, the result *Hearne* reached, as a matter of common law interpre-

tation and common sense, is now mandated by federal and state free speech jurisprudence. In *Hearne*, a newspaper reported that the plaintiff had been "'hurling dishes"' at his wife; in fact, he had not thrown dishes at his wife, but was guilty of cruelty and assault against her person in other respects, such as by pinching her arm and holding a gun to her head. (P. 763.) Our Supreme Court, on examination of the record, reversed a $10,000 verdict, an enormous sum in 1898, finding the gist or sting of the charge was cruelty and assault, and if those charges were substantially true, as a matter of law, it did not matter that no dishes were thrown: "The substantial imputation against plaintiff is the evidence of a violent assault upon his wife. The manner of the assault and the means used in making it are mere matters of detail; and statements in that regard do not change the complexion of the affair in any degree to plaintiff's disadvantage in the mind of the reader." (*Id.* at pp. 671, 675.) Similarly, here the charge of overbilling was substantially true, and the details of whether the overbilling was by the day or month were legally irrelevant. It is especially significant that in *Hecrne* the court addressed this issue of the gist or sting of the report as a matter of law, on independent review. (Pp. 673-676.) We should do the same here. (*See Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.)

The majority opinion is also inconsistent with our high court's recent decision, holding that we cannot simply leave to the jury the question of whether there could be liability for publication of matters of public interest regarding private persons. (*Shulman v. Group Productions, Inc.* (1998)18 Cal. 4th 200, 228 (Shulman).) In so holding, our high court also quoted with approval and followed the decision of the Seventh Circuit in *Haynes, supra*, 8 F.3d at page 1234, which held: "To any suggestion that the outer bounds of liability should be left to a jury to decide we reply that in cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on judicial control of the jury."

"As in other jurisdictions, California law permits the defense of substantial truth ...; 'it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citation.]" (*Masson*, *supra*, 501 U.S. at pp. 516-517.)

Similarly, the federal authorities utilize the First Amendment[1] to protect speech on matters of public interest when the assertions are substantially true, even though inaccurate in some minor detail; and compel the exercise of our obligation to review the record independently to determine whether a judgment constitutes a forbidden intrusion on protected rights of free speech. "The requirement of independent appellate review . . . is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage.' It reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection *is not merely a question for the trier of fact*." (*Bose, supra*, 466 U.S. at pp. 510-511, italics added.)

Accordingly, our review in this case "carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557, 567.) The same duty of independent review is also imposed by

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[1] The free speech guarantees of article I, section 2 of the California Constitution are even broader than those of the First Amendment. (See *Wilson v. Superior Court* (1975) 13 Cal. 3d 652, 658.

the California Constitution. (*Katzev v. County of Los Angeles* (1959) 52 Cal. 2d 360, 365-366.)

A court evaluating a defamation verdict which significantly involves First Amendment considerations must be far less deferential to the verdict of the jury. The Supreme Court held in the important case of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285 that in examining (and in that case, reversing) a jury verdict in a defamation cases the appellate courts "must 'make an independent examination of the whole record,' [citation], so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression." (Quoting *Edwards v. South Carolina* (1963) 372 U.S. 229, 235.) This principle has been consistently followed by the federal Supreme Court in subsequent cases. (See, e.g., *St. Amant v. Thompson* (1968) 390 U.S. 727, 732 [A defamation verdict was reversed, while noting "it is essential that the First Amendment protect some erroneous publications as well as true ones."]; *Greenbelt Co-op. Publ. Assn., Inc. v. Bresler* (1970) 398 U.S. 6, 13-14 [A jury verdict in a defamation case was reversed where Bresler had been accused of "blackmail" because he took a tough stance in negotiations, which accusation as a matter of law did not impute criminal conduct as the jury had found.].)

The First Appellate District has also applied heightened scrutiny to First Amendment cases, requiring that a heavy burden be met by those seeking to penalize speech. (See, e.g., *Sussli v. City of San Mateo* (1981)120 Cal. App. 3d 1, 9 [Per Newsom, J.: "Moreover, when First Amendment rights are at issue, a reviewing court must make an independent examination of the whole record in order to determine whether that burden has been satisfactorily met."].) Under this requirement of independent review, we cannot hide behind jury findings which are inconsistent

with free speech guarantees, when the issue before us is whether a statement is protected by the First Amendment or by article I, section 2 of the California Constitution because it is the gist of a true statement.[2]

The majority has not cited, and my own research has not found, any apposite authority which holds we must apply the more deferential standard of review the majority posits here, in order to uphold a jury verdict in a defamation case such as this one, because it involves the claimed defamation without malice of a private figure. In McCoy, our high court indicated precisely to the contrary. (42 Cal. 3d at p. 844 & fn.6.) Later, our high court in Shulman and the Seventh Circuit in Haynes confirmed this indication by applying independent review in defamation actions involving, as here, private figures and matters of public interest. In sum, where a defamation issue implicates First Amendment guarantees, such as the issue of substantial truth in this case, an independent appellate review is re-

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[2] Our Supreme Court is presently considering this issue in a case also arising from the First Appellate District (Division Five), *Aguilar* v. *Avis Rent-a-Car System, Inc.* (1996) 50 Cal. App. 4th 28 (review granted Sept. 4, 1996 (S054561)). In that case, as in this one, a majority of this division applied only deferential, not independent, review; and although reversing a lower court judgment on other grounds, nevertheless remanded for proceedings which I found would violate First Amendment guarantees. In *Aguilar,* as here, I filed a concurrence and dissent indicating that the free speech issues at stake required independent review, and that the plaintiff's claims recreated on remand were inconsistent with free speech rights. This case shows strong similarities to *Aguilar,* in which our Supreme Court has been considering these important First Amendment issues for almost two years. The final decision in the case at bench may well be impacted by the high court's anticipated decision in *Aguilar.*

quired regardless of whether the person claiming defamation is a public or private figure.

A review of the other relevant California cases also leaves no doubt that the substantial truth doctrine applies here. For instance, in *Heuer v. Kee* (1936) 15 Cal. App. 2d 710, 712-714 (*Heuer*), the defendant stated that the plaintiff, a schoolteacher, had broken the tooth of a child while disciplining him. In fact, there was no proof the teacher had struck the child in the mouth or intended to knock out his teeth; she had swatted at his head; and he fell against a desk, breaking a tooth. Nevertheless, the court determined that the gist of the charge, overzealous discipline of children, was true in light of evidence that the teacher had pulled the hair of children, shaken them, and pushed their heads against the wall. In the same way here, the charge of overbilling was substantially true, and "'a slight inaccuracy in the details will not prevent a judgment for defendant.'" (*Id.* at p. 714; accord, *Bose, supra*, 466 U.S. at p. 513.)

In *Hayward v. Watsonville Register-Pajaronian and Sun* (1968) 265 Cal. App. 2d 255, 257-258, 261-262, the First Appellate District held that there could be no libel as a matter of law, where the defendant stated the plaintiff "'previously served a term in a Kansas prison on a check charge.'" In fact, the plaintiff was never in a prison in Kansas; he was sentenced to a reformatory after a conviction for forgery, but was paroled before he began to serve time there. However, we held that, as a matter of law, the gist or sting of the accusation–that the plaintiff had been convicted of theft involving false statements–was a substantially true report of a judicial proceeding. The charge of overbilling is true here as well.

In *Handelsman v. San Francisco Chronicle* (1970) 11 Cal. App. 3d 381, 386-388 (*Handelsman*), the First Appellate District held there could be no libel as a matter of law where it was reported that the plaintiff was accused of "theft" when in fact he had only been sued civilly for conversion. We held that it was the effect of the charge on

"the average reader" and not on some specialized legal or professional audience which determined the substantial truth of the charge, and we held that the report "is not to be judged by the standard of accuracy that would be adopted if it were the report of a professional law reporter or a trained lawyer." (*Id.* at p. 387.) The same is true here.

In *Jennings v. Telegram-Tribune Co.* (1985) 164 Cal. App. 3d 119, 122-124, it was reported that the plaintiff was convicted of "'tax fraud'" or "'tax evasion.'" In fact, he had pleaded no contest to the misdemeanor of failure to file tax returns, which did not necessarily require a technical showing of fraud or evasion. However, the Fourth Appellate District held as a matter of law that the gist or sting of the report was the accusation that the plaintiff had committed "serious tax crimes," and found this accusation to be substantially true. (*Id.* at p.127.) In the same way, the gist or sting of the alleged libel here was overbilling, which was substantially true.

Finally, in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal. App. 4th 855, 859-860, 869-870 (*Morehouse*), this court (Division Five of the First Appellate District) held as matter of law that there could be no liability for libel after the plaintiff was described as the operator of a"'sensuality school."' Although the school also offered courses in other more usual subjects such as philosophy, it did offer a Ph.D. program in "'sensuality"' and many courses had "an explicitly sexual theme." We held as a matter of law that since "the substance and gist of the characterization is true, any minor inaccuracy cannot be deemed libelous." (*Id.* at p.870, citing *Heuer*, *supra*, 15 Cal. App. 2d at p. 714.) The same is true here.

C. No Relevant Facts Exist for Jury Determination

The majority remands for further jury trial on damages although no relevant issues of fact on liability remain in dispute, thereby requiring entry of JNOV for Fireman's Fund. It is admitted that Tarkington did overbill Fireman's

Fund, and there is no dispute that the one matter of detail concerning a monthly overbilling was not literally true. The gist or sting of the charge of overbilling was substantially true. What is left for the jury to do? The only issue remaining is a legal one, i.e., did the substantial truth doctrine apply. Resolution of a gist or sting issue, even if that issue were a mixed question of fact and law, cannot be abdicated to the ad hoc fact finding of a lay jury. Constitutional free speech protections require that such issue be resolved by this court after an independent record review.

In this case, the gist or sting of the accusation was overbilling for legal fees. There is no dispute as to the fact Tarkington did overbill for 33 hours in one day, and that in many other respects its billings were faulty, overstated, or unsubstantiated. Tarkington, however, contends the accusation that it billed 785 hours in one month was a substantial untruth because Tarkington was thereby exposed to contempt in the specialized world of insurance company litigation departments, where a single overbilling on one day could be accepted as a one time error, whereas a single overbilling for one month would be viewed with great horror. However, where the gist or sting is overbilling, and where that accusation is true, an inaccuracy as to the time period overbilled for is not a substantial enough deviation from the truth so as to change the sting of the accusation for "the average reader" whose reactions are properly in issue. (*Handelsman, supra*, 11 Cal. App. 3d at p. 387; see also *Bates v. Campbell* (1931) 213 Cal. 438, 442 (*Bates*) ["That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader."].)

The "average reader" of the publication in question here would understand it as an accusation that Tarkington overbilled for its services. That accusation was shown by indisputable evidence to be substantially true, in the sense in which an average reader would understand it, although the literal statement of overbilling by the month rather than

by the day was not shown to be true. The fact that the publication allegedly had a different effect on some specialized subgroup of readers trained in the law or expert in insurance defense matters was not legally relevant. The relevant audience for purposes of defamation liability is that comprised of average readers. (See *Bates, supra,* 213 Cal. at p. 442; see also *Dorsey v. National Enquirer, Inc.* (9th Cir. 1992) 973 F.2d 1431, 1435, 1437-1438 [Under California law, there could be no libel as a result of a publication's summarizing a report that an entertainer had AIDS. The question of how an average reader would understand the report was one of law for the court, and the publication was substantially accurate.].)

D. The Record Will Not Support an Accusation of Fraud

The majority opinion also conflicts with the decision of Division One of the First Appellate District in *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal. App. 3d 991. Relying on *Hearne*, Weller held that the issue of defamatory meaning may not be the subject of testimony or evidence attempting to show that the allegedly defamatory (and here substantially true) statement would be understood by some readers as implying other defamatory meanings. As *Weller* held, "Appellants are correct that lay opinion is not admissible for the purpose of proving that the alleged defamatory statements in fact were understood as implying defamatory facts." (Pp. 1008-1009.) Thus, the majority errs when it relies on certain testimony at trial in an attempt to show that the truthful reports of overbilling also implied a special meaning of fraud. (Pp. 21-22.)

The majority errs again when it holds that justified complaints about overbilling can support a claim for defamation, merely because those complaints might suggest an accusation of fraud, which was not in fact made. (See *Fleming v. AT & T Information Services, Inc.* (D.C. Cir. 1989) 878 F.2d 1472, 1474 [There was insufficient evidence to support a claim for defamation where the defen-

dant merely observed, truthfully, that a situation might allow plaintiff to commit fraud, without making such an accusation.].)

E. An Independent Review of the Record Compels Remand With Instructions to Grant the Motion for JNOV by Fireman's Fund

It is especially noteworthy here that the statement of overbilling by the month was not contested at the time by Tarkington's own counsel; he instead offered a plausible, innocent explanation for the monthly overbilling, i.e., that three months of billings were wrongly conflated into one month. Indeed, the entire discussion in issue here consists of only a few relatively innocuous sentences, buried on a back page, in just one of the extensive and well-balanced *Recorder* article's sixty-three paragraphs, stating in its entirety as follows: "Brockett [counsel for Tarkington] says these anomalies turned out to be data-inputting mistakes. Three days of Tarkington's time had been recorded on one date, he says. Where one timekeeper had billed 785 hours in a month – well above the 720 hours in a 30-day month – Brockett says three months worth of time had been combined accidentally in one month, with no time entries in adjacent months."

This rather bland paragraph, composed mostly of counsel's admission and plea in extenuation, also pales even further in comparison with the disclosures by the audit and the findings of the arbitrator, a retired judge, who ruled on the underlying fee dispute. The arbitrator found that not just one month of time, but in fact almost $500,000 worth of time, had been overbilled by Tarkington to Fireman's Fund. He found these were not just isolated innocent errors or data inputting mistakes, but that Tarkington's "time keeping and task description in many instances did not comply with the express and implied terms of its contract with the insurers, and resulted in exaggerated unjustifiable time being billed . . . to its clients. According to the arbitrator, Tarkington submitted "untrue" bills: "It is inescapable that over the years invoices were submitted for pay-

ment by the insurers with representations of time and task and case designations which were untrue."

The arbitrator clearly found that this pattern of overbilling minimally implicated constructive fraud by Tarkington under Civil Code section 1573: "[Tarkington] at times fell within the proscription of Civil Code section 1573, in misleading the insurers both in logging time and in characterization of tasks performed, in breach of its duty." The arbitrator also found cases of actual intentional fraud: "There can be no doubt that, as to the billing of the senior partner's time generated by merely adapting another employee's time sheets, the practice was [willfully] and knowingly false." Thus, even if the majority opinion is assumed correct, arguendo, in suggesting that the accusations of overbilling carried to some specialized audience an imputation of fraud, any imputation of fraud was substantially true as well.

When properly considered as a whole, the relatively mild media reports of overbillings in issue here, claimed to have been predicated on statements of a Fireman's Fund representative, were substantially true; and the fact that the overbillings did not include a particular monthly overbilling was a matter of detail which simply could not create liability for defamation. (See *Morehouse, supra,* 37 Cal. App. 4th at pp. 869-870.) We should, therefore, reverse the judgment on the grounds that the charge of overbilling was shown by uncontested evidence to be substantially true, and that the erroneous statement contended to be defamatory comprised the gist or sting of that true charge and is, thus, immune from a defamation claim. We should remand to the trial court with instructions to grant the defense motion for JNOV.

II. The Trial Court Committed Prejudicial Error by Admitting Into Evidence the Amount of the Defendant's Legal Fees, Which the Jury Then Awarded as Damages

Finally, the trial court abused its discretion by admitting evidence that the legal fees of Fireman's Fund in the underlying fee litigation had been $3 million. The majority opinion fails to make any ruling on this contention. (P. 31.)

The amount of the legal fees of Fireman's Fund was not relevant here on any known theory. It was apparently admitted here as relevant to the issue of actual malice and punitive damages, a matter which the majority opinion correctly notes was not in issue in this case. (P. 14.) This improper evidence was prejudicial here, because the precise number the jury should not have heard, $3 million, immediately reappeared as the jury's damages award in this case. It is as if the jury had improperly been told that the defendant was insured for $3 million and then returned a verdict for $3 million. Moreover, the $3 million figure was repeatedly stressed by Tarkington's counsel in closing argument, where it was harped upon at least eight times, before the jury went out to return an identical verdict amount of $3 million. The error was, therefore, obviously prejudicial. (See *Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, 570.)

IV. Conclusion

I would wholly reverse the judgment and remand with instructions to grant the motion of Fireman's Fund for JNOV.

PETERSON, P.J.

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

STEPHEN F. O'NEILL, JOHN D. O'CONNOR, CHRIS A. TARKINGTON and TARKINGTON, O'CONNOR AND O'NEILL, a corporation,

Plaintiffs,

vs.

THE WHITE CORPORATION; FIREMAN'S FUND INSURANCE COMPANIES; JAMES SCHRATZ; GARY BLACK; STUART, MAUE, MITCHELL & JAMES; BARGER & WOLEN; MCNITT, EDWARDS & SCHRANER; and RICE, FOWLER, KINGSMILL, VANCE, FLINT & BOOTH; and DOES 1 through 100,

Defendants.

CASE NO. 958950

ORDER REGARDING DEFENDANT'S MOTIONS FOR NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT

[FILED December 20, 1996]

On December 13, 1996, Defendant Fireman's Fund Insurance Company's ("FFIC's") Motions for New Trial and for Judgment Notwithstanding the Verdict came on regularly for hearing in Department 9 of the above-entitled

Court, the Hon. Alfred Chiantelli, Presiding. Plaintiff Tarkington, O'Connor & O'Neill ("Tarkington") was represented by John D. O'Connor and Stephen F. O'Neill of Tarkington, and John E. Hill and Michael Guta of the Law Offices of John E. Hill. FFIC was represented by Jeffrey Parsons of Beirne, Maynard & Parsons, and Elizabeth R. Palmer of Rice Fowler Booth & Banning.

Having considered the pleadings filed in support of and in opposition to said motions and oral argument of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED that:

1. FFIC's Motion for Judgment Notwithstanding the Verdict is GRANTED as to the breach of fiduciary duty verdict, and Tarkington shall take nothing as a result of said verdict;

2. FFIC's Motion for Judgment Notwithstanding the Verdict is DENIED as to the libel verdict entered in favor of Tarkington; and

3. FFIC's Motion for New Trial is DENIED on all grounds.

DATED: December 20, 1996

/s/
The Hon. Alfred Chiantelli
Judge of the Superior Court

APPENDIX C

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

STEPHEN F. O'NEILL, JOHN D. O'CONNOR, CHRIS A. TARKINGTON and TARKINGTON, O'CONNOR AND O'NEILL, a corporation,

Plaintiffs,

vs.

THE WHITE CORPORATION; FIREMAN'S FUND INSURANCE COMPANIES; JAMES SCHRATZ; GARY BLACK; STUART, MAUE, MITCHELL & JAMES; BARGER & WOLEN; MCNITT, EDWARDS & SCHRANER; and RICE, FOWLER, KINGSMILL, VANCE, FLINT & BOOTH; and DOES 1 through 100,

Defendants.

CASE NO. 958950

JUDGMENT

[FILED October 28, 1996]

This action came on regularly for trial by jury on September 4, 1996. With Tarkington, O'Connor & O'Neill appearing by John D. O'Connor and Stephen F. O'Neill of Tarkington, O'Connor & O'Neill and by John E. Hill and Michael P. Guta of The Law Offices of John E. Hill, its attorneys, and Defendant Fireman's Fund Insurance Company of America appearing by Kurt Micklow and Eliza-

beth R. Palmer of Rice, Fowler, Booth & Banning, and by Jeffrey R. Parsons of Beirne, Maynard & Parsons, LLP, its attorneys; a jury of twelve (12) persons was duly impaneled and sworn; witnesses testified; and after being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdicts:

We the jury in the above entitled action find the following special verdict on the following questions submitted to us:

Question No. 1: Do you find that the Defendant is liable for fraud?

Answer: ("Yes" or "No) No

Question No. 2: Do you find that the Defendant is liable for breach of fiduciary duty?

Answer: ("Yes" or "No") Yes

Question No. 3: Did the Plaintiff have "unclean hands":

a) As to the Plaintiff's fraud Claim?

Answer: ("Yes" or "No") N/A

b) As to the Plaintiff's breach of fiduciary duty claim?

Answer: ("Yes" or "No") No

As to any claim to which you have found the defense to "unclean hands" applies, do not answer Question No. 5 with respect to that claim.

Question No. 4: Do you find that the Defendant is liable for defamation?

Answer: ("Yes" or "No") Yes

You should answer the next question only if you have found liability on the part of the Defendant for fraud or breach of fiduciary duty for which the defense of "unclean hands" does not apply or if you have found the Defendant liable for defamation.

Question No. 5: What amount of damages, if any, were legally caused to Plaintiff and recoverable according to the instructions given to you?

Damages: $3,000,000

Dated: October 11, 1996

Lee Oliver

Foreperon

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that Plaintiff Tarkington, O'Connor & O'Neill recover from Defendant Fireman's Fund Insurance Company of America $3,000,000.

Dated: October 11, 1996

Alfred Chiantelli

JUDGE OF THE SUPERIOR COURT

APPENDIX D

First Appellate District, Division Five, No. A077091

S072157

IN THE SUPREME COURT OF CALIFORNIA

TARKINGTON O'CONNOR & O'NEILL,

Appellant

v.

FIREMAN'S FUND INSURANCE COMPANY,

Appellant

[FILED September 30, 1998]

Appellant's petition for review DENIED.

Baxter, J., and Brown, J., are of the opinion the petition should be granted.

GEORGE

Chief Justice

APPENDIX E

SUPERIOR COURT OF
THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

FIREMAN'S FUND INSURANCE COMPANY,	No: 950454
Petitioner,	ORDER GRANTING PETITION TO CONFIRM ARBITRATION AWARD
vs.	
TARKINGTON, O'CONNOR & O'NEILL, a professional corporation,	DATE: April 13, 1993 TIME: 9:00 am DEPT: 9, LAW AND MOTION
Respondent.	

[FILED April 13, 1993]

The petition of FIREMAN'S FUND INSURANCE COMPANY for an order confirming an arbitration award came on regularly this date for hearing by the court.

Good cause appearing therefore,

IT IS ORDERED that the award of Judge Robert H. Kroninger, retried, dated March 9, 1993 and attached hereto, is confirmed and that judgment be entered in conformity therewith.

DATED: April 13, 1993

HONORABLE LUCY KELLY McCABE
JUDGE OF SAN FRANCISCO
SUPERIOR COURT

ROBERT H. KRONINGER, Arbitrator
PO Box 500
Inverness CA 94937

(415) 669-7382

ALTERNATIVE ADJUDICATION

TARKINGTON, O'CONNOR & O'NEILL professional corporation, Petitioner.	)	No. 91-3
	)	DECISION AND AWARD OF ARBITRATOR
vs.	)	
FIREMAN'S FUND INSURANCE COMPANY. a California corporation Respondent.	)	

[Dated March 9, 1993]

The above matter having been submitted after hearing and briefing on Petitioner's (hereinafter TO2) claim for a balance of attorney fees and expenses due, and on Respondent's (hereinafter FF) counter-claim for refund of sums paid, the Arbitrator now renders his DECISION AND AWARD, as follows:

In early 1987 TO2 became substituted counsel for Plant Insulation Company, at the instance of three Plant insurance carriers including FF, in defense of some 1,000 asbestos related tort actions then in various stages of litigation. Several hundreds were soon added and thereafter from 25 to 50 or more new cases came into the office monthly, until TO2 was handling several thousand Plant cases in all.

The insurers were acting under a Defense Agreement entered among themselves and with Plant, by which Commercial Union (CU) was to act as the lead carrier, to establish guidelines, procedures and forms for the defense law firm, to receive and review billings and to notify counsel of any discrepancies in bills and negotiate adjustments.

The agreed compensation by the insurers to TO2 for its services was $110 per hour for attorney time and $70 for "paralegal" time. In the first month of service, TO2 logged and billed general services to a general file and case specific work to case files. Apparently because not all insurers were equally involved in all plaintiff's actions. CU reacted to that first billing by requesting that billed time be keyed to specific cases. (" . . . [P]lease divide the general bill over those individual bills submitted for the time period. In other words, if your general bill is $50,000 and you are billing on 100 individual files, please add 1/100th or $500 to each individual bill.") TO2 responded that, "The general account will be allocated by total amount billed divided by the total number of files billed . . . As part of the simplification process, we are attempting to phase out the General Account and will apply these amounts to individual files."

Thereafter, TO2 periodic invoices to CU, usually more than one foot thick, were case specific and spread attorney and paralegal time among cases (often arbitrarily selected) in .1 hour increments. Over a period of more than two years of representation and billing by TO2, FF paid just under two million dollars as its share of fees and cost only complaints, as lead carrier, were that bills seemed too high on occasion, whereupon TO2 sometimes cut fees, and reiteration of an earlier request that timekeepers be identified by initials, with which a TO2 tardily complied.

After some two years the insurers retained a firm specializing in law office auditing to inquire into and report on the TO2 billing practices. The motivation for this is unclear, but it may have been because of suspicions or as a result of several insurers being added to the defense fund.

In any event, as a result of that report, and several supplemental reports, FF rejected then outstanding bills and has refused to honor subsequent billings, and TO2 was removed as counsel.

TO2 has negotiated settlement of outstanding accounts with the other insurers. The law firm now seeks recovery of FF's unpaid share of invoices in the amount of $820,495.93, plus an asserted FF's share of the expense to TO2 of the audit, $20,798.07, plus FF's share of fees and costs for services during transition while the cases were being transferred to substituted counsel, $49,745.99.

TO2 also seeks some $60,000 as FF's purported share of representation in other matters, billed as UNI and ROY, but there was no evidence that FF agreed or otherwise had any obligation with respect thereto, and that claim is rejected. TO2 also seeks reimbursement of the cost of a long term lease of office space and of a computer, both added in anticipation of continued employment. But this was an at-will agreement, and TO2 had neither express nor implied contractual reason to expect retention for a period of time. FF has no obligation to reimburse the firm for any risks it chose to assume.

FF complains that TO2 surreptitiously altered the method of calculating its charges in breach of the case specific spread billing of time of the agreed hourly rate, and charged certain work on a unit or flat rate. FF points particularly to:

> 1) An answer with a cross-complaint against Plant's supplier of asbestos products, drafted and subsequently used in all cases as they arose, instead of billing for the actual time expended in that effort, TO2 billed at one hour of attorney time -- in some instances two -- for each new case as the pleading was filed.
>
> 2) When circumstances later required research and drafting of an amended cross-complaint for use in as many as three thousand cases, each case was billed at

.2 hour of attorney time, rather than for time actually spent on the effort.

3) When attorneys appeared for trial calls, they spread what sometimes appeared to be arbitrary time equally among cases.

4) When general tasks were performed, case names and task descriptions would be selected arbitrarily, as would logged time. In particular, the senior partner of TO2, who assumed general supervision of the office's asbestos team, captured part of his time by directing a staff member to log at first 50, later increased to 100. hours monthly under his name, with case names and tasks listed arbitrarily on his time sheets.

In addition to complaining of unit billing and the uses to which TO2 put spread billing. FF complains that clerical personnel time was billed as paralegal time and that costs were inflated, particularly outside copy services.

TO2 responds that, aside from isolated clerical invoicing errors and outside copy charges, all billed time was for work actually performed and any failure to conform to case and date specificity was the result of attempts to comply with the impossible task of being case specific with several thousand similar cases.

FF adduced no evidence to dispute adequacy of TO2's representation of the client, Plant, or that over all charges were reasonable. And a number of prominent opposing (plaintiff) asbestos counsel opined that TO2 was among the top asbestos defense firms in the area in competence, integrity and economy of use of staff. Evidence was also offered tending to show that while TO2 handled the cases the cost of defense per case was lower than average in the area.

FF responds that competence is not the point, nor does it matter that value may have been received for billed services, but asserts that TO2's billing practices resulted in

repeated willful misrepresentation of both tasks performed and time expended and that obtaining payment of fees through such conduct amounts to fraud, for which TO2 should not only be denied outstanding fees but be required to disgorge fees previously paid, regardless of services rendered.

A FF witness, qualified as an expert on "ethical billing standards as practiced by California attorneys", testified that ethical standards as well as contract law require that a lawyer's bills be accurate in describing both time and task, as that is the only way the client knows he is getting what he pays for. He opined that billing a flat rate, or unit charge, when the agreement with the client calls for payment for time expended would be a breach of contract and would amount to fraud if it resulted in intentional over billing; the same would be true if a task for which time was billed was improperly described on the worker's time sheet. And if a misunderstanding arises between attorney and client, he said, it is the duty of the attorney to see that it is resolved; if counsel feels that the terms of compensation need to be changed, the client must be consulted and change made only on agreement.

FF urges several types of conduct as supporting a finding of not only breach of contract but actual or constructive fraud:

> 1) Suspect or impossible hours. TO2 time logging practices made it difficult to calculate any given worker's time, but the audit did reconstruct the actual billed time of several TO2 employees to show a number of 16 to 20 hour billed days which resulted from allocating time, typically one hour, to a dozen or more files, and a 22.5 and a 23 hour day and one of 29 hours reduced from a time sheet of 323 hours created by allocating .1 hour to 32.3 files. All save the last were humanly possible, but those as well as many days logging fewer hours FF urges are at best suspect in view of the manner in which they were

created, that is by attributing an apparently arbitrary time period to a large number of cases.

2) Tardiness in acquiescing in the insurers' request that timekeepers' initials be included on invoices is also urged as evidence of intent to deceive. TO2 prebills contained such information but, until late 1989 and a second request by CU, that information was not provided the insurers, thus making it impossible to readily verify the amount of time any particular worker was claiming or the position held.

3) Disguising what amounted to unit pricing by distributing charged time artificially among a number of time keepers, as e.g., with the amended cross-complaint. This shows a conscious effort to deceive, says FF, as does also disguising the senior partner's charges for general supervision to make them appear case and task specific by amending another time keeper's logs.

4) FF also proffers as evidence of fraud time sheets which the named time keeper could not identify and denied having prepared, time sheets prepared at times remote from reported dates and instances of time directly input to the computer without time sheet support.

FF's evidence that clerical tasks were charged at paralegal rates is based largely on the job title held by particular employees. FF's expert acknowledged, however, that there is no formally recognized or defined status of "paralegal", and opined that what is clerical work and what paralegal work depends on the facts. If one knows that clerical work is being billed as paralegal it would amount to fraud, he said, but an employee's time may properly be billed as paralegal despite lack of that title. The evidence here cannot support a finding that any material amount of clerical work was billed as paralegal services, it appearing that the kind of work for which the insurers were billed at the paralegal rate generally required some degree of so-

phisticated knowledge of the asbestos litigation and the exercise of judgment beyond that normally required of a file clerk.

Time keeping for lawyers, as well as paralegals, is another matter. There is no doubt that TO2 found case specific billing onerous, but while an unhappy party to a contract at will has the options of negotiating revised terms or of resigning, he does not have the right to unilaterally and covertly alter the terms to his personal satisfaction. Over the life of TO2's representation of Plant, tens of thousands of hours were billed to the insurers, and there is no doubt that the greater part represented time actually expended for services rendered. It is clear, however, that TO2's time keeping and task description in many instances did not comply with the express and implied terms of its contract with the insurers, and resulted in exaggerated unjustifiable time being billed, e.g., in connection with the answer and cross-complaint and the amended cross-complaint. There were also what amounted to flat rate or unit charges for some work, particularly the 100 hours, which translated $11,000 per month, which the senior partner justified as general supervision.

It is a daunting, indeed impossible, task to quantify with any precision the resultant amount of unsupportable time. Neither the auditors retained by the insurers nor FF's counsel at trial claimed ability to do so. But the cumulative effect of the evidence which was adduced is to convince one that the use to which spread billing was put resulted in substantial over statement of the time expended in performing many tasks, and that little care was taken to curb such a tendency.

If a law office billing practice amounts to "an extreme case of fraud" the entire bill may be disallowed, FF's expert said; with something less, "judgment" must be exercised, though it is "not an easy task," and the degree of sophistication of the client may be considered, he said.

It is inescapable that over the years invoices were submitted for payment by the insurers with representations of time and task and case designations which were untrue. The insurers were apparently indifferent to the case designation; but they were entitled to have time accurately recorded and billed and to be given accurate description of tasks performed. Unsurprisingly, no witness testified to a willful intent to defraud. And it appears that TO2's billing practices were generally driven by an intent to reflect what TO2 perceived as reasonable compensation for services rendered. In its zeal, however, the firm at times fell within the proscription of Civil Code section 1573, in misleading the insurers both in logging time and in characterization of tasks performed, in breach of its, duty. To the extent that over billing resulted, there was damage to the insurers.

FF was a sophisticated client. And taking TO2's billing practices all in all, it cannot be said that this was "an extreme case of fraud." Therefore, applying FF's expert's guidelines, disallowance of all T03 fees is unwarranted. At the same time, no amount of sophistication or laxity of a [*illegible*] will bar recovery of payments induced by misrepresentation. And here, even if CU had been conscientious in examining invoices, it would not have been possible to glean from them enough information to know how much time each employee was claiming for the various asserted tasks, and for this TO2, not the insurers, is at fault and must suffer the consequences of uncertainty resulting from its long delay in identifying time keepers on invoices. In attempting to quantify damages, therefore, FF's figures are accepted.

There can be no doubt that, as to the billing of the senior partner's time generated by merely adapting another employee's time sheets, the practice was wilfully and knowingly false. FF is entitled to recover in its entirety its share of payments induced by that practice, amounting to $80,750.

There were other instances in which time and task entries for a number of staff members could not reasonably

have been factual. Quantifying that over billing with any certainty is impossible. FF suggests an assumption of 20% of pre-audit bills. That proposal will be accepted while recognizing that any figure is somewhat arbitrary. FF's share is calculated at $196,182, and FF will be credited with that amount.

Fee claims based on unit or flat rate charges also present a difficult problem. To the extent that they fairly represented time expended and services rendered it cannot be said that any material damage resulted, though they amounted to a deceptive deviation from the terms of the agreement with the insurers. But when gross overstatement of time resulted, as [*illegible*] in the drafting and filing of the answer and cross-complaint and the amended cross-complaint, damage resulted. Such fees must be disallowed in their entirety, for though TO2 may not have had a conscious intent, to defraud, the conduct was such that again it fell within the proscription of Civil Code section 1573. So, not only should unpaid bills based thereon be disallowed but FF should recover payments unwittingly made. Figures based on the audit as suggested by FF will be accepted as guidance. For its share of payments for filing of the answer and cross-complaint and for the amended cross-complaint project, FF will be credited with $48,952 and $14,111 respectively.

A dismissal project was treated by TO2 in the same way in its billing, and the same result should follow. FF's share of payments on that endeavor was $10,362, for which credit will be given.

TO2 acknowledges some inadvertent double-billing for which credit should be given. Per the audit, FF's share is $6,434. Also acknowledged is entitlement to refund for over billing outside copy services, for which FF's share is $6,788.

In the circumstances, the disallowance the above claims and the assumption of a 20% overstatement of others, is

deemed to be sufficient punitive response to TO2's billing irregularities.

Subject to the above credits, TO2 has proven its claim to a balance of $820,495 due from FF during the period of service as counsel for Plant, and $49,746 for time and [*illegible*] during the transition period after removal from the cases. There was no agreement for reimbursement of TO2's time expended in the audit however and, particularly in view of the disclosures of the audit, no compensation for that time would be appropriate.

In sum, TO2 is entitled to its fee and cost claims of $870,241, reduced by the above credits totaling $463,579, for a net award of $406,662.

AWARD

TO2 is awarded against FF the sum of $406,662, with interest from the date hereof, in full satisfaction of all outstanding obligations arising from TO2's representation of Plant on behalf of FF. (Pursuant to the terms of the parties' agreement for submission to arbitration, no award of costs is made.)

March 9, 1993

ROBERT H. KRONINGER
Arbitrator